BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 13-07

GLOBAL LINK LOGISTICS, INC.,

COMPLAINANT,

v.

HAPAG-LLOYD AG,

RESPONDENT.

COMPLAINANT'S EXCEPTIONS TO INITIAL DECISION

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The Initial Decision ("I.D.") correctly finds that, pursuant to the Commission's leading decision in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (2000) ("*Cargo One*"), jurisdiction lies with the Commission to adjudicate the claims of Global Link Logistics, Inc. ("Global Link") that respondent Hapag-Lloyd AG ("Hapag-Lloyd") violated several sections of the Shipping Act by virtue of its conduct towards Global Link in connection with their 2012 service contract. The I.D., nonetheless, dismisses Global Link's complaint. The I.D. errs in doing so. First and most importantly, the I.D. wholly misconstrues the nature of the claims Global Link is making and betrays a fundamental lack of understanding of how service contracts work in the real world - - and of the customary practices of carriers and shippers, and in particular NVOCCs, operating under service contracts. This understanding is a necessary predicate to a fair-minded and reasoned analysis of Global Link's Shipping Act claims. To establish what the custom and practice is in the industry in regard to service contracts, and whether Hapag-Lloyd's actions in this instance constituted an unreasonable refusal to deal, unjustly discriminatory methods or unreasonable practices, Global Link should be afforded an opportunity to present expert testimony, as well as evidence gleaned from discovery, supporting its claims. Here, the I.D.'s premature denial of such an opportunity unfairly precludes Global Link from doing so and in the process prevents the Commission from carrying out its statutory obligation of ensuring that the regulatory process "for the common carriage of goods by water in the foreign commerce of the United States" is nondiscriminatory, fair and reasonable. 46 U.S.C. §40101(1).

As a result, if left standing, the I.D. would preclude the Commission from considering whether it is a fair and reasonable practice for a carrier to: 1) repeatedly raise rates during the term of the service contract; 2) alter its schedules so as to no longer service one of the NVOCC's largest customers; 3) refuse to adjust its rates to market conditions, thus preventing the NVOCC from attracting customers for the carrier's services; and 4) then sue the shipper for its inability to use the carrier's out of market services. Global Link submits that on its face such high-handed and overbearing tactics do not comply with the Shipping Act's requirements that carriers engage in fair and reasonable practices.

The I.D. is also contrary to the Commission's clear guidance in *Cargo One* that

> ... a complaint may be dismissed *only* if, construing *all* inferences in favor of the complainant, 'no relief may be granted under *any* set of circumstances that could be proved consistent with the allegations contained in [the] complaint.'

28 S.R.R. at 1642 and 1637 (all "doubts and inferences must be construed in favor of the non-moving party.") (emphasis added). Given the Commission's explicit direction that a complaint's every inference be drawn in the Complainant's favor and that the Complainant be allowed to present its case provided there is any articulable basis upon which such a claim may be asserted, the I.D.'s grant of Respondent's motion to dismiss is clear error.

GLOBAL LINK'S EXCEPTIONS TO THE INITIAL DECISION

1. Global Link Logistics, Inc. ("Global Link") takes exception to the following statement on page 1 of the I.D.:

> The contracts also established a minimum quantity commitment ("MQC"); that is, a minimum number of 20-foot equivalent units (TEUs) that Global Link was required to ship with Hapag-Lloyd and that Hapag-Lloyd was required to transport for Global Link during the life of the contract.

In fact, there is no definite commitment in the service contracts that Hapag-Lloyd actually transport the MQC for Global Link for at least two reasons. First, what service Hapag-Lloyd has committed to is explicitly made "subject to the schedules and service patterns of [Hapag-Lloyd]." Essential Terms, Term 5 (Service Commitments). Thus, by its plain terms, Hapag-Lloyd is permitted to change the port origins and destinations it services, its dates of departure and arrival and the transit times for its shipments at its sole discretion, and the shipper is still obligated to use its services or pay a substantial penalty. In fact, this is exactly what happened under the 2012 Service Contract at issue in this proceeding when Hapag-Lloyd cancelled services to a port critical to one of Global Link's primary shippers, resulting in the loss of this cargo. Declaration of Bianca Hollander at ¶¶17-22, attached as Exh. A. Having thus unilaterally made it impossible for Global Link to meet the MQC, Hapag-Lloyd then sued Global Link for having failed to do so. Second, as more fully discussed in the Memorandum in support of these exceptions, the service contracts permitted Hapag-Lloyd to unilaterally raise Global Link's rates at any time during the contract term, thereby destroying Global Link's ability to produce cargo for shipment under the contracts. Here, in fact, Hapag-Lloyd unilaterally increased Global Link's rates at least seven different times during the 2012 Service Contract at a time when rates in the market were dropping. Exh. A at ¶¶ 6-16. Again, it defies any definition of fairness or reasonableness to permit a carrier to unilaterally raise rates and then to permit that carrier to sue an NVOCC based upon its inability to sell those artificially high rates to its customers.

Further, the 2012 Service Contract explicitly permitted Hapag-Lloyd to not carry 10% of the MQC (i.e., 250 TEUs) with no penalty. This privilege arises from Section 11.2 of the Liquidated Damages Provision, which provides in relevant part as follows:

> If Carrier fails to fulfill its service commitment in Article 7 hereof during the Contract Term, the Shipper's sole remedies shall be as follows:
>
> Shipper shall be entitled to reduce its Minimum Quantity Commitment by the quantity of cargo tendered as provided for hereunder, but not carried. In the event that the Minimum Quantity Commitment is reduced by more than ten percent (10%) pursuant to this provision, then Shipper shall be entitled to a freight discount of $50/100 per TEU/FEU on an amount of subsequent TEUs/FEUs tendered for shipment under this Contract equal to the number of TEUs/FEUs by which the original Minimum Quantity Commitment is reduced in excess of ten percent thereof. Such discount shall not apply more than once per TEU/FEU.

Thus, Hapag-Lloyd was entitled to refuse to carry 10% of the MQC with no penalty whatsoever.[1] For the remaining 90% of the MQC, Hapag-Lloyd was entitled to make a commercial choice as to whether it would actually transport Global Link's cargo. If it had other cargo whose rate was more than $50 per TEU (or $100 per FEU) higher than the rates charged for Global Link's cargo, Hapag-Lloyd was entitled to refuse to transport Global Link's cargo and the only consequence would be a reduction in its profit margin on the alternative cargo carried. In sum, contrary to the statement in the I.D., Hapag-Lloyd was not required to actually transport the MQC for Global Link during the life of the contract, because any service commitments it made were nullified by the broad exceptions that Hapag-Lloyd inserted into the contract.

[1] The reduction of 10% of the MQC is actually a penalty on Global Link since it does not have the right to have this cargo transported.

2. Global Link takes exception to the following statement on page 2 of the I.D.:

> Briefly summarized, Global Link contends that by charging the rates set forth in the 2012 Service Contract, Hapag-Lloyd violated three sections of the Act.

This statement mischaracterizes the Complaint. Global Link's contention is that Hapag-Lloyd failed to follow a procedure and practice that was not only previously established between Global Link and Hapag-Lloyd but that is the usual and customary practice of most carriers with respect to service contracts and, in particular, contracts between ocean common carriers and NVOCCs. These normal customary practices consisted of (a) agreeing to adjust the contract rates during the term of the contract to keep them at or close to market levels to enable the NVOCC customer to attract sufficient cargo to meet the MQC; and (b) agreeing, if the shipper was unable to meet the MQC, to adjust the MQC downwards to the amount of cargo actually shipped or extend the contract for another year and roll the MQC into the extended contract. By failing and refusing to follow these normal and customary practices, Hapag-Lloyd unreasonably refused to deal or negotiate with Global Link in violation of Section 41104(10) of the Shipping Act; discriminated against Global Link in violation of Section 41104(3) of the Act; and failed to observe and enforce just and reasonable practices in violation of Section 41102(c) of the Act.

3. Global Link takes exception to the following statement on page 2 of the I.D.:

> The Act does not require a common carrier to renegotiate terms of an existing service contract when a shipper becomes dissatisfied with its terms.

While this statement may be true as far as it goes, it does not describe the problem articulated in Global Link's complaint. The problem is that Hapag-Lloyd failed to observe and follow established practices and customary procedures with respect to service contracts which, in fact, are common among all ocean common carriers and are necessary and appropriate to make the service contract system work reasonably and fairly given the one-sided and illusory nature of the standard service contract terms and conditions the Commission has permitted to be used by ocean common carriers. If afforded an opportunity to do so, Global Link will submit expert testimony as to the established practice and custom in the industry and the unfairness of the system when carriers choose not to follow the industry practice.

4. Global Link takes exception to the following statement on page 2 of the I.D.:

> Facts alleged in Global Link's Complaint demonstrate that the rates established in the service contract that Hapag-Lloyd charged Global Link are higher than rates Hapag-Lloyd charged to other shippers.

This statement is incomplete and therefore incorrect. This, again, reflects a faulty understanding of Global Link's allegations. Global Link's complaint is that the rates charged by Hapag-Lloyd were higher then the market rates, which were the rates that it would take for Global Link to attract the cargo to ship under the service contracts. Pursuant to common practices in the Transpacific shipping trades, carriers work with their service contract partners to keep rates at market levels. During the 2012 Service Contract term, Global Link informed Hapag-Lloyd of what those market rates were; and requested that Hapag-Lloyd agree to put those rates in the service contract, but Hapag-Lloyd refused to do so. Having refused to provide its service at market rates, Hapag-Lloyd should not be permitted to impose onerous penalties upon Global Link when Global Link's customers refused to use Hapag-Lloyd's over-priced services.

5. Global Link takes exception to the following statement on page 3 of the I.D.:

> The Complaint alleges that the parties' course of dealing between the parties (*sic*) in the first five contracts imposed a duty on Hapag-Lloyd to reduce or "roll over" the MQC to the following year's contract if Global Link was unable to meet the MQC specified in a service contract.

This mischaracterizes Global Link's Complaint. Global Link's Complaint asserts that the course of dealing between Hapag-Lloyd and Global Link was the same as the general course of dealing in the ocean transportation industry. It was, at a minimum, therefore, an unreasonable practice for Hapag-Lloyd to unilaterally deviate from the established practice in the industry for other than legitimate transportation factors by refusing to amend the MQC down to the amount of containers actually shipped or roll over the MQC into an extended contract.

6. Global Link takes exception to the following statement from pages 3 and 4 of the I.D.:

> The Contract established a minimum quantity of 2500 TEUs for Global Link to ship (2012 Serv. K. E. T. ¶4) and Hapag-Lloyd to transport (Id. ¶5). . . .

The reasons for Global Link's exception to this statement are the same as set forth in Exception No. 1 above.

7. Global Link takes exception to the following statement from page 6 of the I.D.:

> Recognizing the damages resulting from a breach of the MQC by the shipper or of the service commitment by the carrier would be difficult to calculate, the contract contained a liquidated damages clause.

Global Link denies that the liquidated damages clause arose from any recognition that damages resulting from a breach of the MQC by the shipper or the service commitment by the carrier would be difficult to calculate. In fact, the liquidated damages clause was put in the 2012 contract by Hapag-Lloyd, and Global Link was forced to accept it because service contracts are necessary to obtain market rates and service contracts are contracts of adhesion. Global Link submits that the "liquidated damages" clause is actually a penalty because (a) the anticipated damages set forth in the service contract are not a reasonable estimate of what the actual damages would be, and (b) actual damages would not be difficult to calculate. The reason for the liquidated damages clause is simply to allow Hapag-Lloyd to impose a penalty on disfavored shippers such as Global Link that Hapag-Lloyd decided were no longer valued customers. Moreover, the amount of liquidated damages assessed against Hapag-Lloyd in the contract are so *de minimis* as to make them illusory.

8. Global Link takes exception to the following statement on page 6 of the I.D.:

> As characterized by Global Link, although the 2012 Service Contract specified certain rates for transportation between specific points, the contract expressly afforded Hapag-Lloyd "the option to increase those rates at its discretion."

By using the phrase "as characterized by Global Link" at the beginning of this paragraph, the I.D. implies that there is some question as to whether the service contract actually allowed Hapag-Lloyd the option to increase rates at its discretion. This is simply untrue. Even a cursory reading of the relevant sections of the contract clearly demonstrates that Hapag-Lloyd could unilaterally raise the contract rates at any time within its sole discretion simply by publishing them in its tariff rate or rules sections. *See* Service Contract Essential Terms at 6.2, Hapag-Lloyd AG Boiler Plate, E.T. Publication 014, Rule 121 at Article 6. In fact, Hapag-Lloyd not only could unilaterally raise the contract rates, it did so at least seven (7) times during the term of the 2012 Service Contract. Declaration of Bianca Hollander, Exh. A, at ¶¶ 9-16.

9. Global Link takes exception to the conclusion of the I.D. set forth on page 15 to the effect that "[t]he issue of reasonableness does not arise in this proceeding, however."

The I.D. uses this conclusion as a basis upon which to deny the validity of the following allegations made by Global Link that:

1) there was a clear course of dealing between Hapag-Lloyd and Global Link, and also within the ocean shipping industry in general, that rates in an NVOCC service contract

would be kept at or near market levels to enable the NVOCC to attract sufficient cargo to fulfill the MQC of the contract;

2) there was a course of dealing between Global Link and Hapag-Lloyd that was normal and customary throughout the ocean transportation industry that a service contract's MQC would be amended down to the actual volume shipped or rolled over into an extended service contract if the shipper could not meet its MQC;

3) Hapag-Lloyd failed to observe and enforce the practices arising from these courses of dealing with respect to its treatment of Global Link under the 2012 Service Contract;

4) Hapag-Lloyd attempted to "squeeze" Global Link out of the market by quoting Global Link rates that could not move the cargo and then cynically seeking to impose MQC penalties on Global Link for its inability to find customers willing to pay above market rates; and

5) by doing so, Hapag-Lloyd unreasonably refused to deal or negotiate with Global Link; unjustly discriminated against Global Link; and failed to observe and enforce just and reasonable regulations and practices with respect to Global Link's cargo.

In the context of a motion to dismiss, these allegations must be accepted as true -- which the I.D. fails to do. Global Link is prepared to establish the facts supporting each of these allegations through discovery, use of expert testimony, and otherwise. Global Link's claims squarely raise issues of unreasonableness. The I.D.'s conclusion that there are no such issues in this proceeding is, therefore, without basis.

10. Global Link excepts to the conclusion of the I.D. that its allegations do not state a claim that Hapag-Lloyd unreasonably refused to negotiate or deal with Global Link in violation of Section 41104(10) of the Shipping Act.

In *New Orleans Stevedoring Co. v. Bd. Of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001), *aff'd*, 29 S.R.R. 1066, 1070 (FMC 2002), the Commission explained that although the Shipping Act does not guarantee the right to enter into a contract with specific terms, common carriers are precluded from "shutting out" any shipper for reasons having no relation to legitimate transportation-related factors. That is exactly what Global Link asserts here. Global Link alleges that Hapag-Lloyd squeezed it out of the market and that this was done in violation of the Shipping Act, *i.e.*, that Hapag-Lloyd was not relying on legitimate transportation-related factors to squeeze Global Link out of the market. Although the I.D. purports to recognize that "refusals to deal or negotiate are factually driven and determined on a case-by-case basis," *Initial Decision* at 20, quoting *Canaveral Port Auth. - - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1449 (FMC 2003), inexplicably, it fails to allow for the submission of facts supporting Global Link's claim. In ignoring the express provision of Global Link's Complaint at paragraph 58, the I.D. ignores well-established Commission precedent and summarily refuses to allow Global Link the opportunity to discover and present the facts underlying its allegations.

11. Global Link takes exception to the following statement on page 21 of the I.D.:

> A few examples demonstrate the problem with Global Link's argument that Section 41104(10) of the Act requires carrier to renegotiate an existing service contract whenever a shipper demands.

This statement mischaracterizes Global Link's Complaint and evidences a plain misunderstanding of what Global Link alleges in this proceeding. Global Link does not argue that any section of the Shipping Act "requires a carrier to renegotiate an existing service contract whenever a shipper demands." Global Link's argument is that a carrier may not contravene a normal and customary practice in the shipping industry that shippers' rates, in particular those of

NVOCC shippers, will be kept at or near the market rates so the NVOCC can attract enough cargo from its customers to fulfill the MQC. This is a far cry from demanding that a carrier renegotiate an existing service contract rate whenever a shipper demands it. It also betrays a fundamental misunderstanding of how the ocean shipping market works and the fact that rates fluctuate throughout any service contract term, sometimes to a significant extent, which requires a constant re-analysis and rebalancing of service contract rates to keep them current with the market. Again, Global Link is prepared, and entitled, to present expert testimony and other evidence to this effect.

12. Global Link takes exception to the following conclusion on page 22 of the I.D.:

> Hapag-Lloyd's refusal to lower the contract rates did not have the effect of "shutting out" Global Link.

As noted above, Global Link, in fact, alleges that Hapag-Lloyd squeezed it out of the market by refusing to modify the service contract rates to keep them current with the existing market rates. Accepting such allegation as true, which the Commission must do in the context of a motion to dismiss, Global Link asserts a viable claim of a Shipping Act violation.

13. Global Link takes exception to the following conclusion set forth on page 24 of the I.D.:

> The question of whether Global Link and Hapag-Lloyd, through their course of dealing in the earlier service contracts, intended "that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market" and, if so, whether Hapag-Lloyd breached its duty to reduce the rates, do not "involve elements peculiar to the Shipping Act," *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. at 1645, but are inherently contract claims - - questions of fact and interpretations of the service contract - - that the Act and the 2012 Service Contract required to be answered by an arbitrator.

This conclusion is incorrect. In fact, Global Link alleges that the pre-existing course of dealing between Hapag-Lloyd and Global Link represented a course of dealing that was standard in the ocean transportation industry in general. Thus, this is not a contract issue independent of the Shipping Act. Indeed, it is only pursuant to the Shipping Act, and the Commission's regulations governing such service contracts, that a party would enter into a contract whereby its counterpart is allowed to set its own prices and unilaterally adjust its "schedules and service patterns" while simultaneously allowing that counterpart to impose a significant penalty for not using its services, no matter how market unfriendly they are.

Global Link expressly alleges that by failing to observe and comply with the industry standard in its dealings with Global Link under the 2012 Service Contract, Hapag-Lloyd violated the Shipping Act. The I.D.'s finding that such a claim does not arise under the Shipping Act is wholly at odds with a recent Commission decision in this regard.

> We note that the relevant framework in analyzing the Commission's jurisprudence is common carriage. . . . When analyzing whether a common carrier's . . . regulations and practices are just and reasonable, *it is relevant to consider the usual course of conduct of the common carrier . . . and also the course of conduct of other common carriers . . . under similar circumstances.*

Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd-America, Inc., Limco Logistics, Inc., and International TLC, Inc., 32 S.R.R. 1720, 1730 (FMC July 12, 2013) (Order vacating Initial Decision in part and remanding for further proceedings) (emphasis supplied).

This is precisely the analysis Global Link's Complaint invites when it alleges that the course of dealing, or the "usual course of conduct" of both Hapag-Lloyd and the ocean shipping industry at large, is to keep service contract rates at or close to the market and to not enforce MQCs by demanding liquidated damages. For the same reason that the Commission's decision vacated the I.D. in *Yakov Kobel and Victor Berkovich,* and remanded the matter for further proceedings, the Commission should do so here.

14. Global Link takes exception to the finding of the I.D. that the Complaint does not state a claim that Hapag-Lloyd engaged in unfair and unjust discriminatory methods in violation of Section 41104(3).

In addressing this issue, the I.D. takes a rote approach to the Shipping Act and focuses simply on the question of whether a carrier may charge different rates in service contracts to different shippers. As the Commission has repeatedly recognized, however, the Shipping Act is a remedial statute, which must be broadly construed so as to "suppress the evil and advance the remedy." Norman J. Singer, Statute and Statutory Construction, Section 60:1 (6th Ed. 2001); *See Volkswagenwerk Aktiengesellschaft v. FMC,* 390 U.S. 261, 273-75 (1968); *Plaquemines Port, Harbor and Terminal District v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir. 1968); *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965); *California v. United States*, 320 U.S. 577, 584 (1944); *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18, 22 (D.C. Cir. 1981). Thus, even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the purpose of the law. *Nepera Chemical,* 662 F.2d. at 22. Global Link has alleged in its Complaint that Hapag-Lloyd engaged in "other unfair or unjustly discriminatory methods" in violation of 46 U.S.C. §41104(3) by, among other things, failing to observe normal and customary practices in the ocean shipping industry with regard to service contracts and trying to squeeze Global Link out of the market. Taking these allegations as true, they more than state a claim that Hapag-Lloyd violated this section.

15. Global Link takes exception to the conclusion in the I.D. that its Complaint does not state a claim that Hapag-Lloyd failed to establish and enforce just and reasonable practices in violation of Section 41102(c).

Global Link alleges that Hapag-Lloyd violated normal and customary practices with regard to service contracts between it and Global Link, which were also normal and customary practices in the ocean shipping industry. These are precisely the types of allegations that establish a violation of Section 41102(c). Global Link also alleges that the one-sided nature of the service contract is, in itself, an unreasonable practice. As discussed more fully below in its memorandum in support of these exceptions, the ocean shipping market and the rates charged thereunder, are driven almost wholly by service contracts. In allowing carriers to impose virtually uniform one-sided and arbitrary terms and conditions, the Commission fails to satisfy its statutory obligation to ensure that the contract carriage at issue is being provided in a fair and nondiscriminatory manner. Global Link is prepared to show that in large part the market itself has adjusted to the one-sided nature of these service contracts by adopting customary practices - - including that the contract rates will be kept at or close to market rates and that MQCs will very rarely be enforced - - that largely avoid the fundamental unfairness inherent in the terms and conditions of the Service Contract. What the Commission needs to determine, however, is whether, when a carrier opts to deviate from the common practice in the industry and heavy-handedly seeks to enforce the onerous provisions set forth in a service contract's terms and conditions, the Commission has the authority to ensure that shippers and NVOCCs are treated fairly. In this context, the Commission's analysis would necessarily involve an analysis of the service contract system and the activities between Hapag-Lloyd and Global Link under the 2012 Service Contract in the context of the Section 41102(c)'s prohibition against the establishment, observation, and enforcement of unjust and unreasonable practices.

16. Global Link takes exception to the conclusion of the I.D. set forth in page 36 that Global Link's assertions that Hapag-Lloyd's actions in not reducing the MQC in the 2012 Service

Contract and seeking to recover liquidated damages are inherently contract issues reserved for the arbitrator.

For all of the reasons discussed above in its other exceptions to the I.D., Global Link submits that these issues are inexplicably tied up in Shipping Act requirements and manifestly involve "elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. at 1645.

MEMORANDUM IN SUPPORT OF GLOBAL LINK LOGISTICS, INC.'S EXCEPTIONS TO THE INITIAL DECISION

SUMMARY OF THE AGREEMENT

1. **The Commission Has a Statutory Obligation to Ensure that Service Contracts are Fairly Administered**

By statute, service contracts are explicitly subject to Commission oversight. As such, service contracts are not simply private contracts between private parties; they are imbued with the public interest; *see Swift & Company v. Federal Maritime Commission*, 306 F.2d 277, 281 (D.C. Cir. 1962); *ANERA and Its Members - - Opting Out of Service Contracts*, 28 S.R.R. 1215, 1224 (FMC 1999) ("Service Contracts differ from ordinary contracts in that they are subject to certain statutory requirements as to their content and the relationships established between the parties."). Indeed, Congress has explicitly stated that "[t]he purpose of this legislation [creating service contracts] is to regulate fairly a system of common carriage." H.R. Rep. No. 98-53, 98th Cong. 1st Sess. at 17 (1983). Thus, the Commission has a responsibility in administering service contracts and the service contract system to make sure that it protects the shipping public from the types of activities by carriers that violate the prohibitions set forth in the Shipping Act. To successfully accomplish this requires more than simply enforcing whatever onerous obligations a carrier may impose upon its customers in one-sided contracts of adhesion.

The Commission has been entrusted with the duty of fairly regulating the service contract system because it is the regulatory agency that possesses the specialized knowledge of the shipping industry and understands the factual and technical workings of that industry. *See Far East Conference v. United States,* 342 U.S. 570 (1952); *California v. United States,* 320 U.S. 577, 584 (1944), *U.S. Navigation Co., Inc. v. Cunard S.S. Co.,* 284 U.S. 474 (1932). It is also the agency with particular expertise in determining what is an "unreasonable" action or practice or "unfair" and "unjust" discrimination. When a case comes before it implicating these concepts in the context of allegations concerning the abuse of a service contract, the Commission has a duty to hear and consider the facts of the matter as developed and presented by the parties rather than simply blindly enforcing whatever provisions carriers have been able to strong-arm upon shippers and NVOCCS as part of their boilerplate terms and conditions.

2. **For All but the Largest Shippers, the Service Contract System is Based on One-Sided Contracts of Adhesion that Only Work Because Carriers and Shippers Both Understand that Rates Will be Maintained at Market Levels and Minimum Volume Requirements Will Not Be Enforced**

In the Transpacific trade lanes covered by the service contract at issue in this proceeding, the overwhelming majority of service contracts contain terms and conditions that are virtually identical in nature from carrier to carrier and are characterized by the following:

- The carrier's service commitments are minimal at best and do not contain any of the firm commitments suggested in the Shipping Act such as assured space, transit time or port rotations.
- What service commitments there are, are so hedged by exclusions and obligations imposed on the shipper as to be virtually meaningless.

- The carrier has the unencumbered, unrestricted, and unilateral ability to raise the shipper's rates at any time through the simple expedient of making the service contract subject to the carrier's rate and rule tariffs.
- The service contract affords the carrier the unrestricted right to amend its schedule and service patterns as it deems necessary.
- The service contract has a so-called liquidated damages provision that permits the carrier to calculate "damages" by simply multiplying a shortfall in meeting the minimum quantity requirement ("MQC") by an arbitrary number chosen by the carrier and bill the shipper with no necessity to prove actual damages.
- The service contract provides that all disputes will be settled by arbitration with no discovery permitted.

Expert Witness Report of Wayne R. Schmidt at ¶ 8, attached as Exh. B. The combination of these provisions puts the shipper at a severe disadvantage. The shipper cannot be assured that the carrier will actually provide the services necessary to transport his cargo because the carrier's service commitments are subject to "the schedules and service patterns of the carrier." The shipper cannot be assured that it will get space on the carrier's vessels when it actually needs the space because the service contract only contains a generalized obligation that the carrier have enough vessel capacity to carry the MQC sometime during the term of the contract. The shipper cannot be assured that his rates will remain the same because the carrier can unilaterally raise them at any time. And, in the event the shipper cannot meet his MQC because the carrier did not provide services or timely space for his containers or raised the rates to an uncompetitive level, under the terms of the contract the shipper has no recourse to contest a bill for "liquidated damages."

Except for their very largest customers, carriers will not negotiate the terms and conditions in their standard service contract boilerplate. Thus, for most shippers the terms and conditions of service contracts are contracts of adhesion; the shipper can take it or leave it. Virtually all of them take it for two reasons. First, in the Transpacific (and most other) trade lanes, service contracts are the only mechanism by which a shipper can obtain competitive, market rates. Second, in practice, the carriers ameliorate their harsh service contract terms by (a) constantly re-negotiating during the service contract term to keep rates at market levels, and (b) not enforcing the service contract MQC's. Thus, as a practical matter, when carriers operate under service contracts with fairness and good faith – as they usually do – the service contract system operates in a flexible and market-oriented manner to provide value for carriers and shippers alike. Exh. B at ¶¶ 8-11.

When they choose not to act in good faith, however, or punish disfavored shippers like Global Link, service contracts can be blunt instruments used to bludgeon defenseless shippers and NVOCCs. Thus, for example, a carrier and a shipper or NVOCC may enter into a service contract providing for rates at $1,000 per TEU and an MQC of 10,000 TEUs, with a liquidated damages provision of $250 per TEU. Upon execution of the service contract, there is nothing preventing a carrier from unilaterally raising its rates by $300 through the simple expedient of increasing its tariff rates or imposing new or additional charges under its rules tariffs. Such an action would make such transportation uneconomical, and effectively prevent an NVOCC from selling transportation under the service contracts to its underlying customers. Under these circumstances, the carrier can raise its rates to a level at which the shipper cannot perform or ensuring that it never has vessel space at the time the shipper has cargo to ship, thus guaranteeing itself a liquidated damages recovery of $2,500,000. It defies belief that a system of service contracting that affords the carrier such *carte blanche* rights is fair or reasonable. The solution to this problem is not, as the I.D. contends, to simply tell shippers they must negotiate better. That is not a realistic possibility for the overwhelming majority of shippers that do not have huge volumes to tender. To regulate fairly a system of common carriage with respect to service contracts as Congress has directed, the Commission must either require – as the Shipping Act commands – that service contracts be fair and truly bilateral with meaningful commitments by both parties or it must enforce the reasonable and market driven customary practices the carriers have developed to ameliorate the harshness of their service contract terms and conditions.

3. **<u>Global Link Should Have the Opportunity to Present Its Case</u>**

The I.D. has wrongfully determined that the allegations in Global Link's Complaint do not state claims under the Shipping Act. The I.D., however, misunderstands and mischaracterizes Global Link's claims. This case is not about a mechanical interpretation of the language of the Hapag-Lloyd service contract. Global Link's basic contention is that Hapag-Lloyd failed to follow a procedure and practice that was not only previously established between Global Link and Hapag-Lloyd but that is the usual and customary practice in the Transpacific trades with respect to service contracts and, in particular, contracts between ocean common carriers and NVOCCs. These normal customary practices consisted of (a) agreeing to adjust the contract rates during the term of the contract to keep them at or close to market levels to enable the NVOCC customer to attract sufficient cargo to meet the MQC; and (b) by agreeing, if the shipper was unable to meet the MQC, to adjust the MQC downwards to the amount of cargo actually shipped or extend the contract for another year and roll the MQC into the extended contract. By failing and refusing to follow these normal and customary practices, Hapag-Lloyd unreasonably refused to deal or negotiate with Global Link in violation of Section 41104(10) of the Shipping Act; discriminated against Global Link in violation of Section 41104(3) of the Act; and failed to observe and enforce just and reasonable practices in violation of Section 41102(c) of the Act.

Further, Global Link alleges that Hapag-Lloyd squeezed it out of the market. Global Link asserts that this was done in violation of the Shipping Act, *i.e.,* that Hapag-Lloyd was not relying on legitimate transportation-related factors to squeeze Global Link out of the market. The I.D. recognizes that "refusals to deal or negotiate are factually driven and determined on a case-by-case basis." I.D. at 20, *quoting Canaveral Port Auth. - - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1449 (FMC 2003). Inexplicably, however, the I.D. fails to recognize Global Link's claim, which is clearly set forth in its Complaint (at paragraph 58) and summarily refuses to allow Global Link the opportunity to discover and present the facts underlying its allegations. [2]

Global Link is prepared to establish the facts underlying each of its allegations through discovery, use of expert testimony, and otherwise. Global Link's claims squarely raise issues that directly implicate a variety of prohibitions under the Shipping Act. The I.D.'s conclusion that there are no such issues in this proceeding is simply without basis. The Commission should overrule the I.D. and allow this case to proceed.

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[2] Moreover, the amount of liquidated damages to be assessed against Hapag-Lloyd for failure to meet its already minimal service commitments are so *de minimis* as to be illusory. *Service Contracts – "Most-Favored-Shipper" Provisions* (Proposed Rule), 53 Fed. Reg. 8775, 8781 (March 17, 1988). *See* discussion *infra,* at p. 35-36.

ARGUMENT

1. The Initial Decision Did Not Use the Proper Standard in Assessing Global Link's <u>Complaint in the Context of a Motion to Dismiss</u>

As the Commission made clear in the *Cargo One* case,

> … a complaint may be dismissed only if, construing all inferences in favor of the complainant, 'no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in [the] complaint.'

28 S.R.R. at 1642. Further, the Commission instructed that all "doubts and inferences must be construed in favor of the non-moving party." *Id.* at 1637. This is the standard test for a motion to dismiss a complaint that is commonly used by the courts and other administrative agencies. See, *e.g.*, *Newman & Schwartz v. Asplundh Tree Expert Co. Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). The Commission, therefore, must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiffs' favor. *Grant v. County of Erie*, 542 Fed. Appx. 21, 2013 WL 5645566 at * 1 (2d Cir. 2013). Thus, in order to survive a motion to dismiss, the complaint need only contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Simon v. Keyspan Corp.*, 694 F.3d 196, 201 (2d Cir. 2012).

A court may not dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) unless it clearly appears according to the facts alleged that the plaintiffs cannot recover on any viable theory. *Berezin v. Regency Sav. Bank*, 234 F.3d 68, 70 (1st Cir. 2000). If the factual allegations either directly or inferentially set forth material elements necessary to sustain recovery under some actionable legal authority, dismissal cannot be granted. *Roth v. United States*, 952 F.2d 611, 613 (1st Cir. 1991); *McLaughlin v. Boston Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005) (court must indulge all reasonable inferences from the allegations in favor of the plaintiff). The court must accept as true plaintiffs' well-pled factual averments and draw "all inferences reasonably extractable from the pleaded facts in the manner most congenial to the plaintiff's theory." *New England Surfaces v. E.I. DuPont de Nemours and Co.*, 460 F. Supp. 2d 153, 156 (D. Me. 2006); *Streak Products, Inc. v. UTi, United States, Inc.,* Docket No. 13-04 (Order Denying Respondent's Motion to Dismiss), at 5 (ALJ October 23, 2013) (under Rule 12(b)(1) and 12(b)(6) court construes complaint in light most favorable to the plaintiff and accepts all well-pled facts alleged as true). Thus, the court may only grant a motion to dismiss if "it appears beyond doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle him to relief." *Fitzer v. Security Dynamics Technologies, Inc*., 119 F. Supp. 2d 12, 17 (D. Mass 2000)(citations omitted).

Under the Supreme Court's holding in *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007), a complaint merely has to contain a sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Aschroft v. Iqbal*, 556 U.S. 662, 677 (2009). Thus, the complaint need only give the defendant fair notice of the claim and the grounds upon which it rests. *Twombly*, 550 U.S. at 555. Here, Global Link's Complaint easily satisfies that minimal standard. The Complaint asserts in much greater detail than is required pursuant to Federal Rule of Civil Procedure 8 or Commission Rule 502.62, the factual basis for the relief sought and such assertions state a plausible claim for relief.

While the I.D. pays lip service to this standard; *e.g.,* at p. 3, fn. 2, it does not apply it in practice. This is most clearly illustrated in regards to paragraphs C and D in the Statement of Facts of the Complaint. There the Complaint alleges:

> C. During the time Hapag and Global Link were performing under these Service Contracts, the parties' expectations were that Hapag would provide competitive rates so

> that Global Link could continue to attract customers for its NVOCC services, which would enable Global Link to tender shipments to Hapag under the Service Contracts. *Thus, the course of dealing between the parties, and in the ocean transportation industry in general*, was that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market.
>
> D. *The course of dealing between the parties, and the ocean transportation industry in general,* was also that if Global Link was unable to meet the minimum quantity commitment (MQC) specified in the Service Contract, the MQC would be reduced or "rolled over" to the following year's Service Contract.

(emphasis supplied). As the emphasized language clearly states, there are normal and customary practices between Hapag-Lloyd and Global Link, as well as in the ocean transportation industry in general, to (a) keep rates in service contracts at or close to the market level, and (b) reduce or roll over the MQC rather than enforce a liquidated damages penalty. Stated in its most simplified form, Global Link's allegations in its Complaint are that Hapag-Lloyds's failure to observe and enforce these normal and customary practices has resulted in violations of Sections 41104(10), 41104(3), and 41102(c) of the Shipping Act.

Global Link also alleges that Hapag-Lloyd's actions were motivated by its decision to "squeeze" Global Link out of the market. Complaint at ¶ SS. Further, Global Link alleges that the 2012 Service Contract with Hapag-Lloyd does not meet the Shipping Act's requirements in 46 U.S.C. § 40102(20) for "certain rates" and a "defined service level. Complaint at ¶¶ II – KK. While it is clear from the I.D. that the Administrative Law Judge does not believe Global Link can make this case, this skepticism as to the merits of Global Link's claim does not justify dismissal of its Complaint. The decision in this regard is flatly contrary to both Supreme Court and Commission precedent.

In *Twombly*, 550 U.S. at 556, the Supreme Court held that a "well-pleaded complaint may proceed, even if strikes a savvy judge that actual proof of those facts is improbable and that recovery is very remote and unlikely." Indeed, federal circuit courts caution that the plausibility standard set forth in *Twombly* cannot be equated with an analysis of the likely success on the merits. *See, e.g., Sepulveda–Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010). Thus, pleaded facts must be accepted as true and read in a plaintiff's favor "even if seemingly incredible." *Id.*

The Commission similarly set forth a clear standard in *Cargo One* for the analysis of motions to dismiss. Under that standard, "construing all doubts and inferences in favor of [Global Link]" it cannot be said that *no* relief may be granted under *any* set of circumstances that could be proved consistent with the allegations contained in [the] complaint." (emphasis added). Indeed, the Commission's recent decision in the case of *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd-America, Inc., Limco Logistics, Inc., and International TLC, Inc.*, 32 S.R.R. 1720 (FMC July 12, 2013) (Order vacating Initial Decision in part and remanding for further proceedings) provides a template for the types of allegations Global Link is making in its Complaint. In the *Yakov Kobel* case, the Commission stated:

> We note that the relevant framework in analyzing the Commission's jurisprudence is common carriage. . . . When analyzing whether a common carrier's . . . regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier . . . and also the course of conduct of other common carriers . . . under similar circumstances.

Id. at 1730. This is precisely the analysis Global Link's Complaint invites when it alleges that the course of dealing, or the "usual course of conduct" of both Hapag-Lloyd and the ocean shipping industry at large, is to keep service contract rates at or close to the market levels and to not enforce MQCs by demanding liquidated damages, but rather, amending them down to the quantity of cargo actually shipped or rolling them over to an extended contract. The Shipping Act violations committed by Hapag-Lloyd in this case arise from its failure to observe and follow the usual course of conduct in regards to service contracts in its dealings with Global Link under the 2012 Service Contract that is the subject of this proceeding. Under the principles of *Twombly, Cargo One* and *Yakov Kobel* Global Link has clearly stated a claim in its Complaint.

By summarily dismissing the Complaint and depriving Global Link of the opportunity to prove its case, the I.D. mechanically reads and interprets the Service Contract according to its four corners with no reference to the realities of the ocean shipping industry and its customs and practices or the duty of the Commission to "regulate fairly a system of common carriage" with respect to service contracts as directed by Congress. H.R. Rep. No. 98-53, 98th Cong. 1st Sess. at 17 (1983).

As discussed below, the Commission has permitted a service contract system to develop that is characterized by overwhelmingly one-sided contracts in favor of the carriers to which no prudent shipper would agree if he or she had any negotiating leverage or alternative means to obtain market-based ocean transportation rates (and to which large, sophisticated shippers with great leverage do not agree). The unfairness of this system is only ameliorated by standard customs and practices under which carriers do not seek to enforce their unfair advantage. This balance is why the current service contract system, by and large, works well for all participants – large and small -- in the industry. When a carrier, however, such as Hapag-Lloyd in this instance, does not observe the customary practices in a fair and reasonable manner and singles out a disfavored shipper, such as Global Link in this instance, for disparate and unfair treatment, it is incumbent upon the Commission to vindicate the remedial purposes of the Shipping Act by fully considering and fairly addressing such claims; not strangling them at conception by dismissing them with no opportunity for proof.

2. **The Commission Has the Expertise As Well As the Duty to Give Full and Fair Consideration to Global Link's Claims**

A. The Shipping Act

The Shipping Act establishes a comprehensive and detailed program to regulate all aspects of United States ocean transportation involving foreign commerce. 46 U.S.C. §§ 40101-41309. In addition to stating the prerequisites for enforceable tariffs and service contracts, the Shipping Act prohibits certain conduct by carriers, including unjust and unreasonable practices. 46 U.S.C. § 41102(c). Congress created the Commission as the agency to develop and maintain expertise in the international ocean shipping industry in order to administer and enforce compliance with the Shipping Act. See 46 CFR § 501.2(a).

Liberal, purpose driven readings of the Shipping Act are justified and desirable where a particular provision is broadly written, thus signifying an intent by Congress that Commission jurisdiction should not be narrowly construed. *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 273-75 (1968); *Plaquemines Port, Harbor and Terminal District v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir. 1968). The Shipping Acts of 1916 and 1984 have long been recognized as remedial statutes. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965). When a statute is recognized as remedial, it is to be broadly construed so as to "suppress the evil and advance the remedy." Norman J. Singer, Statute and Statutory Construction, Section 60:1 (6th Ed. 2001). The policy that a remedial statute such as the Shipping Act should be construed so as to effectuate its intended remedial purpose is firmly established. *California v. United States*, 320 U.S. 577, 584 (1944); *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18, 22 (D.C. Cir. 1981). Thus, even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the purpose of the law. *Nepera Chemical*, 662 F.2d. at 22.

B. The Commission's Delegation of Authority is Broad and Exclusive

As the exclusive federal agency required to enforce compliance with the Shipping Act's provisions, the Commission's delegated authority includes the responsibility to conduct investigations on its own or to receive and remedy complaints that allege Shipping Act violations. 46 U.S.C. § 41301 et seq. In *U.S. Navigation Co., Inc. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), the Supreme Court concluded that the Commission's predecessor had exclusive jurisdiction over the Shipping Act because it was a comprehensive statute governing common carriers by water. Id. at 480-81. The Court expressly recognized that the Shipping Act's goal of consistent enforcement of its mandate could not be achieved unless the Commission first determined whether or not a rate, rule or practice was unreasonable or unjustly discriminatory. *Id.* at 482. As the Court stated: "Preliminary resort to the Commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." *Id.*

In reaching its conclusion, the Supreme Court held that a specialized agency like the Commission, with its comprehensive knowledge of the peculiar context and circumstances in which the Shipping Act operates, was a more appropriate body than a court to resolve questions about the interpretation and application of this highly specialized law. *Id.* at 485.

Subsequently, in *Far East Conference v. United States*, 342 U.S. 570 (1952), the Supreme Court reached the same conclusion, recognizing that the Commission is best qualified to address matters involving ocean transportation. "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574-75. Further, the Court reasoned that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort for ascertaining and interpreting the circumstances to underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure." Id.

In *California v. United States*, 320 U.S. 577, 584 (1944), the Supreme Court similarly recognized that the Commission had been delegated broad and exclusive authority to enforce the Shipping Act. While in that instance, the Commission was not delegated rate-making powers over the parties at issue, it had been delegated broad authority to ensure that those subject to the Shipping Act "establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storage, or delivery of property." This overarching conferral of authority permitted the Commission to take all steps necessary to ensure that those governed by the Shipping Act did not engage in unjust and unreasonable practices.

> [T]he withholding of rate-making power for service other than water-carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing.

Id.; *see also*, *Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (private complainant may not bring court action regarding alleged violation of Shipping Act because FMC's jurisdiction over such alleged violations is exclusive); *DSW International Inc., v. Commonwealth Shipping, Inc., Abou Merhi Lines, LLC and Abou Merhi Lines,* 31 S.R.R. 1850 (ALJ 2011) *slip op.* at 12, *quoting South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, 28 S.R.R. 1385 (FMC 2000) (footnote omitted), *rev'd on other grounds sub nom. South Carolina State Ports Authority v. Federal Maritime Comm'n,* 243 F.3d 165 (4th Cir. 2001), *aff'd* 535 U.S. 743 (2002) (regulatory scheme created by the Shipping Act requires that Commission make original determination as to whether Act has been violated regardless of whether action initiated by private complaint or by Commission investigation).

C. **The Service Contract at Issue is Subject to Comprehensive Regulation by the Shipping Act, Over Which the Commission Has Jurisdiction**

The Service Contract at issue is governed by and subject to the terms of the Shipping Act. *See* 46 U.S.C. § 40502. As such, Hapag-Lloyd, as carrier, and Global Link, as shipper, are obligated, respectively, to make available definite service at certain rates and to provide a certain volume of cargo as set forth in 46 U.S.C. § 40102(20). The Shipping Act expressly governs service contracts, 46 U.S.C. § 40502 (titled "Service Contracts"), and all service contracts are "subject to the requirements" of the Shipping Act. 46 U.S.C. § 40502(a). These requirements include filing such agreements with the Commission, 46 U.S.C. § 40502(b)(1), the inclusion of certain "Essential Terms," 46 U.S.C. § 40502(c), and publication of those terms. 46 U.S.C. § 40502(d). *See also* §§ 41105(5)-(8) (both prohibiting common carrier agreements from impairing service contracts); 46 U.S.C. § 40701 (requiring certain carriers to maintain just and reasonable rates in service contracts).

Although service contracts are between private parties, the Commission regulates the content as well as the conduct under the contracts. In *Cargo One*, 28 S.R.R. 1635 (2000), the Commission considered the very question presented here, *i.e.*, whether an arbitration provision in a service contract warranted dismissal of a complaint filed with the Commission alleging violations of the Shipping Act. There, the Commission revisited its decision in *Vinmar* and concluded that the Commission is the appropriate forum for resolving allegations of violations of Section 10 of the Act even if they arise from transportation governed by a service contract. "To find otherwise would give little or no meaning to those provisions of Section 10, as well as to the right to file a complaint seeking reparations under Section 11." *Id.* at 1644. Thus, the Commission recognized that the appropriate test in regard to its jurisdiction is whether the claim asserted constitutes a simple breach of contract claim or whether it involves elements peculiar to the Shipping Act. *Id.* Where the Complaint alleges unfair or unjustly discriminatory practices, and involves unjust and unreasonable regulations and practices, that are inherently related to Shipping Act prohibitions, the Commission is the appropriate venue for resolution of the claim. *Id.* at 1645.

Cargo One, therefore, makes clear that, while 46 U.S.C. § 40502(f) provides that the exclusive remedy for a breach of a service contract shall be an action in an appropriate court, the Commission's Congressionally delegated authority requires it to investigate and adjudicate Shipping Act violations that arise pursuant to service contracts, particularly as to the Prohibited Acts under Section 10 of the Shipping Act, 46 U.S.C. § 41101, et seq. Id. at 1643.

In *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda.*, 30 S.R.R. 991, 998 (2006), the Commission again considered the same issue and reached an identical result. There, the Commission determined that it had a responsibility to hear a Complaint alleging violations of the Shipping Act arising from a service contract notwithstanding that the parties to the contract had already received an arbitration decision concerning the same contract. In so doing, the Commission explained that its interest outweighs the intentions of the private parties, as set forth in the arbitration clause of their service contract. "While Section 8(c) provides that parties to a service contract may agree to arbitrate breach of contract issues, it was not Congress' intent that the Commission be barred from adjudicating whether the parties' conduct violates the Shipping Act and Commission regulations." *Id.* at 999. Thus, the arbitration provision in the Service Contract at issue did not divest the Commission of its jurisdiction.

Here, the Complaint alleges that Hapag-Lloyd engaged in a number of unreasonable practices that constitute violations of the Shipping Act. Specifically, the Complaint alleges that Hapag-Lloyd violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations and practices; Section 41104(3) by resorting to unfair or unjustly discriminatory methods; and Section 41104(10) by its unreasonable refusal to deal or negotiate. As reflected above, the Commission has previously found that complaints of "unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission." *Cargo One*, 28 S.R.R. at 1645 (2000); *Streak Products, Inc. v. UTi, United States, Inc.*, *supra* at 6 (ALJ October 23, 2013).

In addition, with regard to the validity of service contracts, the Commission has held:

> The regulation of service contracts is akin to the regulation of agreements, because the Commission is the regulatory body charged with administering the Shipping Act and, therefore, must ensure that service contracts and agreements are filed and implemented pursuant to the statutory requirements and Commission regulations.

Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda., 30 S.R.R. 991, 998 (2006).

In *Cargo One* and *Anchor Shipping*, the Commission further recognized that it has a statutory mandate to ensure that service contracts comply with the Shipping Act and the Commission's regulations, so that it can be certain that the public and the shipping industry are protected, which interest outweighs the intentions of the private parties. Here, those same policy considerations come into play. Thus, for those same reasons, the Commission here should determine whether the Service Contracts at issue are valid and whether Hapag-Lloyd violated the Shipping Act, rather than to allow such decisions to be made by an arbitrator with no knowledge or expertise in regard to the Shipping Act.

D. The Hapag-Lloyd Service Contracts are Representative of Most Service Contracts in the Transpacific Trades in That They are One-Sided in Favor of the Carrier; Do Not Contain Definite Service Commitments and Certain Rates; And Contain Liquidated Damages Clauses That Are Actually Penalties For The Shipper And Illusory As To The Carrier

1. Requirements for Service Contracts

The bedrock requirement for service contracts, intended by Congress and repeatedly recognized by the Commission, is that they must contain "meaningful rate and volume commitments on behalf of the shipper and meaningful service commitments on behalf of the carrier." *Service Contracts – "Most-Favored-Shipper" Provisions*, 24 S.R.R. 1351, 1361 n. 15 (FMC 1988); As the Commission stated in the Proposed Rule issued in that proceeding:

> Meaningful minimum quantities of cargo over a fixed time period and rate and defined service level commitments between a carrier and a shipper are the legislative quid pro quo for departing from the published tariff rates of the carrier that would otherwise apply. The failure of the contract parties to fulfill the basic requirements of this quid pro quo ... offends the legislative scheme crafted by Congress ...

Proposed Rule, 53 Fed. Reg. 8775, 8781 (March 17, 1988). *See also,* 24 S.R.R. at 1360 ("Senator Breaux ... states that [service contracts] were intended ... to enable both shippers and carriers to make mutual commitments .... Congressman Jones ... notes the importance of the Commission's reiteration of its policy to require meaningful rate and service *(sic)* commitments for shippers and meaningful service commitments for carriers."); *Western Overseas Trade and Development Corp. v. ANERA,* 26 S.R.R. 874, 883 (FMC 1993) (service contracts must contain "meaningful service commitments"). As the Commission clearly stated as early as 1989:

> In essence, service contracts must, by statute, contain certain definite commitments by both the carrier and the shipper. Moreover, these commitments must be meaningful; *i.e.*, the contract parties must undertake real obligations. Service contracts that are indefinite or contain illusory undertakings simply do not meet the definition of "service contract" under the 1984 Act. A service contract that lacks definite and mutual consideration not

> only fails to meet the statutory definition but may also be invalid and unenforceable at common law.

Service and Cargo Commitments in Service Contracts, Circular Letter No. 1-89 (April 12, 1989) at 3.

This requirement for meaningful and real commitments on the part of both parties to a service contract is also clearly expressed in the Shipping Act's definition of a service contract. This definition provides that the shipper must "commit to providing a certain volume or portion of cargo over a fixed time period" and the carrier must commit to "a certain rate or rate schedule and a defined service level." 46 U.S.C. §40102 (20). (underlining added). These are affirmative requirements. *ANERA and Its Members – Opting Out of Service Contracts*, 28 S.R.R. 1215, 1224 (FMC 1999).

There is no doubt that the obligations imposed upon Global Link under the 2012 Service Contract with Hapag-Lloyd, as well as under its previous service contracts, satisfy the Commission's requirements in regard to service contracts. Global Link clearly committed to "tender for shipment on vessels of the Carrier during the term of this Contract the Minimum Quantity Commitment of cargo specified in Term 4 of Appendix A …". Hapag-Lloyd AG Boiler Plate, E.T. Publication 014, Rule 121 at Term 5.[3] Term 4 of Appendix A (Essential Terms) sets forth the Minimum Quantity Commitment as "2500 (Two Thousand Five Hundred) TEU."

Hapag-Lloyd, however, did not commit to either a defined service level or certain rates in the contracts or, indeed, undertake any meaningful obligations to Global Link.

[3] The service contract is made subject to this Rule from the Hapag-Lloyd Boiler Plate by Term 10 of the Essential Terms.

2. <u>The Service Contracts Do Not Contain a Defined Service Level</u>

Hapag-Lloyd's service commitments to Global Link are set forth in the 2012 Service Contract as follows:

> Carrier agrees to make available during the term of this Contract vessel capacity adequate to carry the Minimum Quantity Commitment of cargo spread reasonably on a weekly basis over the duration of this Contract and, at Carrier's option, any additional cargo tendered by Shipper during the term of this Contract. This service commitment is subject to the schedules and service patterns of the Carrier. Shipper agrees to give fourteen (14) days booking notice, if possible, but no less than seven (7) days, to the Carrier for any Contract shipments.

<u>Hapag-Lloyd AG Boiler Plate</u>, E.T. Publication 014, Rule 121 at Term 7. Although this provision contains a form of words mimicking a real commitment, upon closer analysis it is apparent that Hapag-Lloyd has reserved to itself virtually total discretion to provide whatever services it sees fit. In the first place, Hapag-Lloyd's service commitments are explicitly made "subject to the schedules and service patterns of the Carrier." Thus, even if this provision were interpreted to require Hapag-Lloyd to set aside a weekly commitment of vessel space for Global Link's cargoes, Hapag-Lloyd was entitled, in its sole discretion, to change its transit time, port rotations and any other schedule or service component of its transportation offering and these changes would take precedence over any of Global Link's transportation needs.

In fact, Hapag-Lloyd unilaterally changed its service under the 2012 Service Contract by discontinuing its sailings from Yantian, China to Memphis, Tennessee via Vancouver. Exh. A at ¶ 20. It did this despite the fact that one of Global Link's largest customers utilized Hapag-Lloyd's service from Yantian, and indeed, only shipped out of Yantian. *Id.* at ¶¶ 21-22. Further, although Hapag-Lloyd later promised to allow Global Link to ship out of Yantian through a United States West Coast port, Hapag-Lloyd repeatedly refused Global Link's bookings on that service - - despite the fact that Global Link had an allocation from Hapag-Lloyd of 6 TEUs per week out of Yantian for that service *Id.* at ¶¶ 23-24. Moreover, as evidenced by its actions during the term of the 2012 Service Contract, Hapag-Lloyd reserved the right to reduce its allocation of space to Global Link under the Service Contract based on its own failure to offer competitive rates to Global Link. *See* Complaint at ¶ W.

In addition, the Service Contract explicitly provided Hapag-Lloyd with the option of only carrying 90% of the MQC (i.e., 250 TEUs) with no penalty. The Liquidated Damages provision of the Service Contract states:

> If Carrier fails to fulfill its service commitment in Article 7 hereof during the Contract Term, the Shipper's sole remedies shall be as follows:
>
> Shipper shall be entitled to reduce its Minimum Quantity Commitment by the quantity of cargo tendered as provided for hereunder, but not carried. In the event that the Minimum Quantity Commitment is reduced by more than ten percent (10%) pursuant to this provision, then Shipper shall be entitled to a freight discount of $50 /100 per TEU/FEU on an amount of subsequent TEUs/FEUs tendered for shipment under this Contract equal to the number of TEUs/FEUs by which the original Minimum Quantity Commitment is reduced in excess of ten percent thereof. Such discounts shall not apply more than once per TEU/FEU.

Hapag-Lloyd AG Boiler Plate, E.T. Publication 014, Rule 121 at Term 11.2. Thus, Hapag-Lloyd was entitled to refuse to carry ten percent of the MQC, even if tendered by Global Link, with no penalty whatsoever. Thus, while the Contract absolutely committed Global Link to tender for transportation 2,500 TEUs, it only required Hapag-Lloyd to accept for transportation 2,250 TEUs. This is not a mutual obligation.

Moreover, the liquidated damages amounts Hapag-Lloyd was obligated to pay Global Link for failure to meets its service commitments were so *de minimis* as to make those commitments illusory. These liquidated damages were a paltry $50 per TEU and were structured as a freight discount rather than a payment. They were also only applicable to the remaining 90% of Global Link's MQC after Hapag-Lloyd exercised its right to refuse to carry – with absolutely no penalty

-- the first 250 TEUs tendered by Global Link. Thus, if this liquidated damages amount is calculated over the entire MQC, the real figure is only \$45 per TEU (\$50 x 2,250 ÷ 2,500 = \$45). In *Service Contracts – "Most-Favored-Shipper" Provisions*, the Commission termed liquidated damages of less than \$100 per container as "patently *de minimis*." 53 Fed. Reg. at 8781 n. 21. Assuredly, the minute damages to be paid by Hapag-Lloyd for breach of its service commitments to Global Link in the 2012 Service Contract fall squarely within that definition and make a mockery of those service commitments. In effect, Hapag-Lloyd can buy its way out of its obligation by simply paying Global Link \$50 per TEU. Thus, if Hapag-Lloyd sees an opportunity to accept another shipper's cargo with a profit margin higher than \$50 per TEU, it is free to do so under the Contract terms with no economic penalty at all. Given the ease with which Hapag-Lloyd could avoid its "service commitments" under the Contract, it is readily apparent that Hapag-Lloyd is assuming no meaningful obligations under its Service Contract.

3. <u>The Service Contracts Do Not Contain a Certain Rate Level.</u>

While purporting to establish a rate level in Annex B, the Contract actually permits Hapag-Lloyd to raise the rates at will and in its sole discretion through the simple device of making them subject to Hapag-Lloyd's tariff. Section 6.1 of the Essential Terms (E.T.) of the Contract provides that:

> Except as otherwise specified in this Term, and subject to Article 6 of the Boilerplate, rates charged for the carriage of commodities under this Contract shall be those set forth in this Term Annex. . .B. . .etc.

The exceptions in the remaining portions of Term 6 of the Essential Terms and Article 6 of the Boiler Plate, however, deprive this clause of any real substance. For example, Section 6.2 (Rate Applicability) of the Essential Terms provides that "[u]nless otherwise specified in this Contract, all cargoes moving hereunder shall be subject to:

- All other tariff charges, including
- Charges
- Surcharges
- Currency adjustment factors
- Bunker fuel surcharges
- Arbitraries
- Origin and destination delivery charges
- Charges/Taxes imposed by Government or other legal [whatever that means] authorities including Port Authorities
- Add-ons
- Other additional charges

All of these are to be "at such levels as are applicable in the governing tariff(s)[4] applicable at the time of shipment."

Further, Term 6.2(b) of the Essential Terms provides that Global Link's cargoes are subject to "[a]ll rules in the governing tariff(s) applicable at the time of shipment." Frequently, tariff rules set forth additional charges applicable to shipments with the carrier. Finally, Term 6.2(d) of the Essential Terms provides that Global Link shipments are also subject to:

> Any charges or surcharges relating to costs incurred in connection with newly-established security requirements (whether established bylaw, statute, regulation, or by a service provider to Carrier) applicable to or relating to any portion of the transportation and related services provided under this Contract.

Finally, Article 6 of the Boiler Plate, provides as follows:

> If, at any time during the life of this Contract, the Carrier implements a General Rate Increase (GRI) or a Revenue Recovery Increase (RRI) in its governing tariffs, the rates in this Contract shall be increased on the same date by the amount indicated in the governing tariffs. Shipper's consent to such filings shall be implied and given hereby and such consent does not need to be signed by Shipper separately. Any increases and accessorial charges that are implemented by the Carrier in its Governing Tariff during the life of the Contract shall also be applicable to the rates in this Contract on the same date as the corresponding increase in the Tariff. Shipper's consent to such filings shall be implied and given hereby and such consent does not need to be signed by Shipper separately.

[4] Article 2 of the Hapag-Lloyd Boiler Plate defines "governing tariffs" as "all applicable rule, rate and other tariffs and Carrier's Essential Terms publication including the rules, charges, surcharges, and arbitrary/additionals therein published."

Hapag-Lloyd AG Boiler Plate, E.T. Publication 014, Rule 121 at Term 6

In this instance, Hapag-Lloyd's unfettered right to raise its rates and to alter its schedule was not merely a hypothetical possibility, it was in fact what repeatedly happened during the term of the 2012 Service Contract. Hapag-Lloyd instituted two peak season surcharges and imposed five (5) different general rate increases upon Global Link during the term of the 2012 Service Contract. Exh. A at ¶¶ 9-14. Thus, Hapag-Lloyd raised its rates seven different times during the course of the 2012 Service Contract. *Id.*

In effect, and in fact, therefore, while the Contract rates established at the time of Global Link's signature purportedly were set, they were entirely subject to Hapag-Lloyd's ability to impose increases or new charges on, at most, thirty (30) days' notice. Exh. A, at ¶¶ 6-18; Exh. B at ¶ 8.

In *ANERA and its Members - - Opting Out of Service Contracts,* 28 S.R.R. 1215 (FMC 1999), the Commission addressed the service contracts of a conference of vessel operators which permitted conference carriers to "opt out" of the contract rates and charge the contract shipper its own tariff rates while still counting the cargo as service contract shipments. There, the conference argued that there was no uncertainty as to the service contract rate because the tariff rate was published and therefore knowable at the time of shipment. *ANERA* further argued that this cross-reference to the tariff complied with FMC regulations. 28 S.R.R. at 1218.[5]

The Commission rejected this argument, pointing out that "[s]ervice contracts historically were instituted as a means to provide lower than tariff rates to shippers willing to commit to ship

[5] This is the same argument that the I.D. accepted in dismissing Global Link's Complaint. *See* I.D. at 2-3, 27-28, 35.

more than a single shipment over time." 28 S.R.R. at 1226. Further, the Commission recognized that "Congressional consideration of the 1984 Act generally reflected the expectation that service contracts, like dual rate contracts, would incorporate rates more favorable than those available in common carrier or conference tariffs." *Id.* at n. 21, *quoting* Report of the Merchant Marine Committee, H. Rep. 98-53, Pt. 1, 98 Cong. 1st Sess. (April 12, 1983) at 17.

> Although this Senate Report also recognized that"[t]o the extent any contract charge or allowance is the same as that in the carrier's or conference's general public tariff, incorporation by reference will suffice," it expressed the understanding that any variation in contract rates would be tied to specific volume commitments. . .."

Id.

Based on this understanding of the Congressional intent as to service contracts, the Commission held that applying the higher tariff rates to service contract shipments was unlawful because:

> [T]he contract fails to provide a "certain rate or rate schedule" not because it refers to rates found in the conference tariff, but because it permits application of the tariff rates (so long as they are higher than the contract rates) to an unspecified amount of the MQC, without distinction from the rates and terms generally found in that tariff. Because tariff rates are unilaterally set, and are offered to all shippers without commitment to ship any amount or proportion of cargo, this would appear to render the rate portion of the carrier's collective contract commitment illusory . . . contracts with opt out clauses appear to lack a quid pro quo for the shipper's commitment to ship a stream of cargo over a term of time.

Id. at 1227.

Hapag-Lloyd's service contract suffers from the same deficiencies identified by the Commission in *ANERA*. On its face, Hapag-Lloyd's 2012 Service Contract obligated Global Link to commit to ship 2,500 TEUs of cargo during the term of the Contract based on the rates set forth in Annex B. Because the Service Contract, however, allowed Hapag-Lloyd to unilaterally set rates pursuant to its tariff, Hapag-Lloyd was not providing any meaningful *quid pro quo* to Global Link in exchange for its MQC contract commitment.

E. Both Carriers And Shippers Have Adopted A Standard Course Of Conduct That Ameliorates The Harshness Of One-Sided Service Contracts In The Transpacific Trades

1. **The Hapag-Lloyd Contract Is Representative of Most Other Service Contracts**

The terms and conditions of the Hapag-Lloyd service contract described above are typical of those that appear in most other service contracts in the Transpacific trades offered by Hapag-Lloyd and the other carriers. Virtually all service contracts, except for those with the largest shippers who have the cargo volumes and negotiating leverage to demand different terms and conditions, contain the same lack of definite service commitments and permit the carriers to raise rates by filing them in their tariffs. Exh. B at ¶ 8. On information and belief, if the Commission were to review the service contracts that it has received for filing, it would discover the truth of these assertions.

2. **Shippers Accept These One-Sided Service Contracts Because Service Contract Rates Constitute The Market For Ocean Transportation Services and Because the Carriers Have Adopted Practices that Ameliorate the Harshness of the Service Contract Terms and Conditions**

Carriers will not negotiate the terms and conditions in their standard service contract boilerplate except for their largest customers who have substantial volumes to ship and, therefore, negotiating leverage. *Id.* For most shippers in the Transpacific trade, service contracts are contracts of adhesion; the shipper can take it or leave it. *Id.* ¶ 9; *see, e.g.,* The Journal of Commerce (May 12, 2014) at 68, Interview with Bruce Carlton, President and CEO of the National Industrial Transportation League (small and medium sized companies are "takers" of ocean transportation services), attached as Exh. C. Virtually all shippers and, in particular, NVOCCs, take it for two basic reasons. In the first place, in the Transpacific (and most other) trade lanes, service contracts are the only means by which a shipper can obtain competitive, market rates. Exh. B at ¶ 9. In its 2001 study of service contract practices resulting from the Ocean Shipping Reform Act of 1998, the Commission found that service contracts at that time accounted for cargo volumes of 80% and more in the major trade lanes. *The Impact of the Ocean Shipping Reform Act of 1998* (September 2001) at 17-20. Today, that percentage is even higher. In a March, 2012 interview, Brian Conrad, Executive Administrator of the Transpacific Stabilization Agreement, stated that "Ninety percent of Asia-US container cargo moves under some 10,000 contracts each year." Supply Chain Management Review (March 5, 2012) at 214, attached as Exh. D. As a practical matter, therefore, shippers have no choice but to use service contracts to move their cargo.

More importantly, the carriers have adopted customary practices in the Transpacific trades that ameliorate the worst effects of the standard service contract terms and conditions as discussed above. One of these practices, particularly in the case of NVOCCs, is that the carriers constantly amend the service contract rates to keep them at or near market levels for the NVOCC cargo. Exh. B at ¶ 11. This is because carriers understand that the NVOCC market is extremely competitive and that the large majority of NVOCC customers choose their carriers based primarily on the rate levels. Therefore, to ensure that their NVOCC customers have sufficient cargo to transport under the service contracts, the carriers make sure that they keep the NVOCC service contract rates at competitive levels. Given the tremendous instability of rates in the Transpacific trades over the past few years, this involves a process of constant communication between the NVOCC customer and its carrier partner in which the NVOCC alerts the carrier to the existence of competitive rates in the particular markets in which the NVOCC operates and the carrier cooperates by adjusting its service contract rates to allow the NVOCC customer to obtain more cargo. If the carriers were to simply sit on the service contract rates and demand their contract rights to collect those rates, as the I.D. appears to assume, NVOCCS simply could not remain in business. This would not only be fatal for NVOCCs it would be harmful to carriers because NVOCCs contribute approximately a third of the cargo volume moving in the Transpacific trades. The reality of the marketplace, therefore, is that carriers depend upon healthy NVOCCs to provide a substantial amount of their business. *Id.*

Thus, even though the carriers continue to draft service contract terms and conditions that are wholly one-sided in their favor and do not contain meaningful service or rate commitments, as a commercial practice and, indeed, commercial necessity, these same carriers cooperate with their NVOCC customers to ensure that, when they enter into service contracts together, the customer will have the means to attract the cargo to fulfill its MQC. This is to the NVOCC's and to the carrier's benefit. Thus, when an NVOCC such as Global Link enters into a service contract with a carrier such as Hapag-Lloyd, particularly when the parties have completed five contracts in the previous five years together, there is an expectation that the carrier will follow the customary practice of adjusting contract rates as described above. In the case of the 2012 Contract here, however, Hapag-Lloyd unreasonably chose to unilaterally raise its rates, change its services, refuse to adjust its rates in response to market conditions and then to sue Global Link for not adequately supporting its services. Such practices constitute Shipping Act violations.

In addition, Hapag-Lloyd violated the Shipping Act by deviating from the customary practice of carriers in the Transpacific trades not to enforce the MQC requirements in their service contracts except in cases where the shipper evidences bad faith. Rather, the practice is to amend the MQC requirement in the service contract down to the amount of cargo actually shipped or, alternatively, to roll the MQC over into the following year's contract. Exh. B at ¶¶

10, 12. By doing this, the carriers maintain the loyalty of their customers through good years and bad and acknowledge the reality that many shippers in any given year are unable to fulfill their MQC requirements. Indeed, Maersk Line - - the largest container carrier in the world - - has admitted that a substantial number of their customers failed to meet their volume requirements in service contracts. In a June, 2011 interview, Maersk Line CEO Eivind Kolding stated:

> If we just take our year-to-date figures, only 41 percent of customers have delivered 100 percent or more of their commitments. If we allow for a little bit of margin, let's say 10 percent variation, let's say 90 percent fulfillment is okay. Only 56 percent of the customers have done that. Still 44 percent of our customers have delivered even 90 percent of what they have promised.

The Journal of Commerce Online (June 23, 2011) www.joc.com/print/426383 at 2, attached as Exh. E. It is obvious that the carriers could not survive if they sued over 50% of their customers each year for liquidated damages penalties. Therefore, in fact, they do not. In this case, however, not only did Hapag-Lloyd refuse to follow the customary practice of cooperating with Global Link to ensure that its rates were close to the market for the commodities it shipped, Hapag-Lloyd also failed to follow the customary practice of amending Global Link's MQC down or rolling it over into a new contract. By failing to follow either of these customary practices in the Transpacific trade shipping industry, Hapag-Lloyd has violated The Shipping Act by refusing to deal with Global Link; subjecting it to unjustly discriminatory methods, and engaging in unreasonable practices. Exh. B. at ¶ 13.

F. Global Link Should Be Given the Opportunity to Present Its Case

Global Link's Complaint raises substantial allegations of Shipping Act violations by Hapag-Lloyd. By taking advantage of an unreasonable and one sided service contract and by failing to observe the normal and customary practices in the ocean shipping industry in the

Transpacific trades whereby carriers work with their NVOCC contract customers to keep rates at or near market levels and freely amend the MQC, or roll it over into another contract, Hapag-Lloyd attempted to squeeze Global Link out of the Transpacific market for NVOCC services and, in the process, Hapag-Lloyd has violated the Shipping Act's prohibitions against unreasonable refusals to deal, use of unfair or unjustly discriminatory methods, and the observation and enforcement of unjust and unreasonable practices. Global Link's allegations raise serious Shipping Act issues that go to the heart of the authority that Congress delegated to the Commission, *i.e.*, the obligation to ensure that service contracts are fairly applied and administered. Because there is a strong preference in American jurisprudence that disputes be resolved on the merits after an opportunity to be heard on the facts, and because here, Global Link has made substantial and credible allegations of Shipping Act violations in its Complaint, the I.D. should be reversed and the opportunity afforded Global Link of a full and complete resolution of its Complaint on the merits.

For the reasons set forth in these exceptions and its memorandum in support of the exceptions, Global Link submits that the Commission should give it this opportunity by overruling the I.D. and remanding this case for evidentiary proceedings.

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DATED: May 27, 2014

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document was delivered to the following addressees at the addresses stated by depositing same in the United State mail, first class postage prepaid, and/or by electronic transmission, this 27th day of May 2014:

Matthew J. Thomas
Blank Rome LLP
Watergate 600 New Hampshire Avenue NW
Washington, DC 20037
Email: MThomas@BlankRome.com

Brenda Allen

EXHIBIT A

Declaration of Bianca Hollander

1. My name is Bianca Hollander. I am the Director of Trade for Global Link Logistics ("Global Link"). Prior to serving as the Director of Trade, I was the Trade Manager at Global Link. In this capacity I had primary responsibility for the 2012 service contract between Global Link and Hapag-Lloyd. I have been employed with Global Link for seven (7) years. Prior to my employment with Global Link, I also worked for more than two years for another Non-Vessel Operating Common Carriers ("NVOCC"). I am submitting this Declaration on behalf of Global Link. This Declaration is based upon my personal knowledge.

2. Global Link has entered into six different service contracts with Hapag-Lloyd dating back to 2007.

3. During the time Hapag-Lloyd and Global Link were performing under these Service Contracts, the parties' expectations were that Hapag-Lloyd would provide competitive rates so that Global Link could continue to attract customers for its NVOCC services, which would enable Global Link to tender shipments to Hapag-Lloyd under the Service Contracts. Thus, the course of dealing between the parties, and in the ocean transportation industry in general, was that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market.

4. The course of dealing between the parties, and the ocean transportation industry in general, was also that if Global Link was unable to meet the minimum quantity commitment (MQC) specified in the Service Contract, the MQC would be reduced or "rolled over" to the following year's Service Contract.

5. Service Contracts normally run from May 1st of one year to April 30th the following year. The 2011 Service Contract (which ran from May 1, 2011 to April 30, 2012) between Hapag-Lloyd and Global Link contained an MQC of 4,000 TEUs (twenty foot equivalent units.) When it became apparent that Global Link would not be able to meet the MQC for the 2011 Service Contract, the MQC was reduced by mutual agreement from 4,000 TEUs to 2,768 TEUs, the amount of TEUs actually shipped under the 2011 Service Contract.

2012 Service Contract

6. In early May of 2012, Global Link and Hapag-Lloyd entered into a new Service Contract. Although the Service Contract specified certain rates, the Contract expressly afforded Hapag-Lloyd the option to increase those rates at its discretion. Thus, for example, if at any time during the life of the Contract, Hapag-Lloyd implemented a General Rate Increase (GRI), Global Link's rates could be automatically increased by that amount. *See* Service Contract, Hapag Boiler Plate, Term 6. Such increases did not require the consent of Global Link.

7. Hapag-Lloyd also had the discretion to impose Peak Season Surcharges (PSS) during the term of the service contract.

8. During the term of the 2012 Service Contract, shipping rates dropped significantly.

9. Hapag-Lloyd imposed a PSS in June 2012.

10. Hapag-Lloyd also added a second PSS to our service contract in October 2012. Hapag-Lloyd was the only carrier that I know of that implemented such an increase in October of 2012.

11. In addition to imposing two peak season surcharges, Hapag-Lloyd also unilaterally imposed a GRI in August 2012.

12. Hapag-Lloyd unilaterally imposed another GRI the following month in September

2012.

13. Hapag-Lloyd unilaterally imposed another GRI in December 2012.

14. Hapag-Lloyd unilaterally imposed another GRI the following month in January 2013.

15. Hapag- Lloyd unilaterally imposed another GRI in April 2013.

16. During the life of the 2012 service contract, Hapag-Lloyd imposed two peak season surcharges and 5 different general rate increases upon Global Link. Thus, Hapag-Lloyd raised its rates seven different times during the course of the 2012 Service Contract.

17. The Service Contract also allowed Hapag-Lloyd to increase assessorial charges by publishing them in its tariff during the life of the Contract. These increases also did not require Global Link's consent.

18. Although Hapag-Lloyd made some rate reductions during the life of the 2012 Service Contract so as to attempt to adjust to the market, such rate reductions were either too little or too late to make it competitive.

19. In addition to allowing Hapag-Lloyd to raise its freight and related charges during the life of the service contract, the 2012 Service Contract was also subject to the schedules and service patterns of Hapag-Lloyd. Essential Terms, Term 5 (Service Commitments).

20. At or around the time that the 2012 Service Contract was executed, Hapag-Lloyd changed its service by discontinuing its sailings from Yantian, China to Memphis via Vancouver. Instead, Hapag-Lloyd began calling upon Shekou, China, rather than Yantian.

21. This schedule change was done without Global Link's consent.

22. The unilateral change in Hapag-Lloyd's schedule was of significant concern to Global Link because one of our primary shippers out of South China utilized Hapag-Lloyd's service from Yantian. Indeed, this shipper only shipped out of Yantian.

23. After a number of months of back and forth with Hapag-Lloyd, Hapag-Lloyd proposed that Global Link could use its service out of Yantian to Memphis via a port in the West Coast of the United States.

24. Despite such an agreement, however, and despite the fact that Global Link had an allocation from Hapag-Lloyd of 6 TEUs per week out of Yantian for that service, Hapag-Lloyd repeatedly refused to provide space for Global Link on that service.

Hapag-Lloyd's Failure to Negotiate Market Rates Under 2012 Service Contract

25. The 2012 Service Contract contained a significant number of "Named Account" rates. A "Named Account" rate is one in which the NVOCC's customer is specifically identified in the contract and the carrier's rates are limited to services provided by the NVOCC for the named NVOCC customer. One of the purposes of Named Account rates is to give a carrier such as Hapag-Lloyd transparency into the NVOCC's customer base, thus giving the carrier the opportunity to manage the NVOCC market through adjustments to rates in NVOCC service contracts. With this knowledge and pricing power, the carrier can substantially effect an NVOCC's ability to increase volumes for Named Account customers and, if the carrier has two or more NVOCC customers with the same named accounts, to prefer one NVOCC customer over the other through manipulation of Named Account rates, by giving a favored NVOCC lower rates for that named account while refusing to provide equivalent rates for the disfavored NVOCC.

26. Historically, Global Link had provided NVOCC services for, among others, DMI Furniture, using Hapag-Lloyd as its carrier. Hapag-Lloyd was fully aware that DMI Furniture was a Global Link customer because DMI Furniture was one of Global Link's named accounts in

the Service Contract. Hapag-Lloyd also knew from its past experience with Global Link that DMI Furniture provided a significant amount of cargo that Global Link used to fulfill its MQC under the Hapag-Lloyd service contract. Indeed, the DMI Furniture cargo alone would have contributed significantly to Global Link's MQC under the Hapag-Lloyd 2012 Service Contract.

27. In May of 2012, Global Link wrote to Hapag-Lloyd stating that it was looking for more shipping lanes to partner with Hapag-Lloyd. It specifically noted that while Hapag-Lloyd's rates for one lane, from Songkhla, Thailand to St. Louis, were low, that was the only DMI Furniture lane where Hapag-Lloyd's 's rates were competitive.

28. Hapag-Lloyd refused to alter its rates to make them market competitive.

29. Global Link had shipped DMI Furniture cargo on multiple Hapag-Lloyd lanes in prior service contracts.

30. Despite Hapag-Lloyd having a course of dealing of reducing MQC's in its Service Contracts with Global Link to reflect the actual volume of goods shipped and despite Hapag-Lloyd having failed to provide competitive rates that allowed Global Link to service its customers, Hapag-Lloyd demanded payment from Global Link of $535,500, which is the amount of the liquidated damages it purports it is owed under the 2012 Service Contract.

I declare under penalty of perjury that the foregoing is true and correct.

Bianca Hollander
Bianca Hollander

Date: May 27, 2014

EXHIBIT B

Expert Witness Report of Wayne R. Schmidt

1. My name is Wayne Schmidt. I am the founding principal of W.R. Schmidt & Associates which provides consulting services regarding ocean transportation and freight logistics as well as general management and operations consulting to companies in the international ocean transportation industry.

2. I have been retained by the law firm of GKG Law, P.C., which represents Global Link Logistics, Inc. in this proceeding, to provide expert advice and testimony on behalf of Global Link regarding the ocean transportation industry, non-vessel-operating common carriers ("NVOCCs"), ocean carriers, and their commercial and operational relationships and processes, particularly with regard to service contracts.

3. I am being compensated for my services in connection with this litigation at a rate of $250 per hour plus expenses.

4. Exhibit 1 to this report is a summary of my experience and qualifications to serve as an expert witness in this proceeding.

5. Exhibit 1 also contains all other cases in which I have testified as an expert at trial, or by deposition, during the previous four years.

6. My opinion in this proceeding is based on the following:

- My 45 years of experience in the ocean transportation industry, including experience working as the Chief Executive/President of three large, multinational NVOCCs, and as a Senior Executive with an ocean carrier, as well as a shipping industry consultant
- My independent investigation of the operational and commercial business practices between ocean carriers and NVOCCs
- My experience in negotiating and operating under well over 100 service contracts as the Chief Executive/President of three multinational NVOCCs
- My knowledge of the use of and termination of service contracts between NVOCCs and ocean carriers, as well as between Beneficial Cargo Owners, and ocean carriers

7. The historical and ongoing contracting period for carriers and shippers in the Transpacific trade lanes is from May 1st through April 30th of the following year. A one-year contract between carriers and shippers is therefore the trade norm, with each carrier creating its own Terms and Conditions (Boilerplate) for carriage.

8. In the Transpacific trade lanes, the overwhelming majority of service contracts contain terms and conditions that are virtually identical in nature from carrier to carrier and are characterized by the following:

- The carrier's service commitments are minimal at best and do not contain any of the commitments suggested in The Shipping Act such as assured space, transit time, or port rotations
- What service commitments there are, are so hedged by exclusions and obligations imposed on the shipper as to be virtually meaningless
- The carrier has the unencumbered, unrestricted, and unilateral ability to raise the shipper's rates at any time through the simple expedient of making the service contract subject to the carrier's rate and rules tariffs
- The service contract affords the carrier the unrestricted right to amend its service and schedule patterns, as it deems necessary at any time during the contracted period
- The service contract has a liquidated damages provision that permits the carrier to calculate its "damages" by multiplying a shortfall and meeting the minimum quantity commitment ("MQC") by an arbitrary number chosen by the carrier and bill the shipper with no necessity to prove actual damages
- The service contract provides that all disputes will be settled by arbitration with no discovery permitted except by agreement of the parties

Only the largest shippers with significant cargo volumes and, therefore, leverage, are able to negotiate different terms and conditions with their carriers.

9. For most shippers, especially NVOCCs, the terms and conditions of service contracts are contracts of adhesion; the shipper can take it or leave it. Virtually all shippers and, in particular, NVOCCs, sign service contracts because the service contracts are the only mechanism by which they can obtain competitive market rates.

10. Based on my personal experience as the President of three very large NVOCCs that entered into a substantial number of service contracts with ocean carriers, and as a maritime consultant negotiating service contracts with ocean carriers during the last 20+ years, every ocean carrier with which I have dealt would, as a matter of course, not pursue MQC shortfalls in their service contracts. Instead, they would either:

a. Amend the service contract before its termination to reduce the MQC to the quantity of cargo that was actually shipped by the customer, or

b. Roll over the unfulfilled volume to the next contracting period by extending the term of the existing service contract, or rolling over the amount of MQC to the next contract period.

The above described actions would typically take place during the final month of the service contract term. In my experience this is the usual and customary practice throughout the ocean shipping industry with regard to MQC obligations and service contracts, and most particularly in the Transpacific shipping lanes where Global Link and Hapag-Lloyd had their service contracts.

11. It is also my personal experience having negotiated and operated under more than 100 service contracts over the past 20+ years as well as consulted with other Beneficial Cargo Owners and NVOCCs on their service contract operations, that ocean carriers will adjust the rates in their service contracts to keep them at market levels to enable the NVOCC customer to attract sufficient cargo to ship with the carrier. This process serves the commercial interests of both the carrier and the NVOCC. For the carrier, it provides the cargo necessary to fill their vessels. For the NVOCC, it enables them to attract customers for their services and to ship enough cargo with the carrier under the service contract to meet the minimum quantity commitment. It would be foolish of the carriers to enter into service contracts with NVOCCs, which ship approximately 30% of the total cargo volumes in the Transpacific trades, and then refuse to adjust the rates in those contracts to meet market conditions. This is particularly true in the Transpacific trades where the commercial market rates have fluctuated, sometimes wildly, over the past five years, based on cargo volumes, at any given time.

12. The claim by Hapag-Lloyd against Global Link for an MQC shortfall is virtually unheard of within the maritime industry and is contrary to the normal practices of either amending the service contract MQC or rolling over the unfulfilled MQC volume as described above. For a carrier to litigate against its own customer for an MQ shortfall does not make

commercial sense, since it is contrary to the carrier's maintenance of an ongoing commercial relationship with its shippers. It also hurts the carrier's reputation when other shippers learn that it is suing its own customers for liquidated damages.

13. Given that the service contract affords the carrier the unrestricted and unilateral ability to raise the shipper's rates at any time through the simple contract condition, of making the service contract subject to the carrier's rate and ruled tariffs, and that it also affords the carrier the unrestricted right to amend its service and schedule patterns, it is an unreasonable practice for carriers to: 1) refuse to adjust the rates in their service contracts to keep them at market levels to enable the NVOCC customer to attract sufficient cargo to ship with the carrier; 2) refuse to amend the service contract before its termination to reduce the MQC to the quantity of cargo that was actually shipped by the customer; or 3) to roll over the unfulfilled volume to the next contracting period by extending the term of the existing service contract, or rolling over the amount of MQC to the next contract period.

I declare under penalty of perjury that the foregoing is true and correct.

Date: May 25th, 2014

Wayne R. Schmidt
Sarasota, Florida

#327147

EXHIBIT 1

WAYNE R. SCHMIDT

4648 Tuscana Drive • Sarasota, FL 34241 • (T) 941-923-2071 • (C) 732-673-2919 •
wrschmidtusa@aol.com

Senior Operations Executive, Consultant and General Management in ocean transportation industry. Hands-on operational experience as an ocean carrier; NVOCC; and freight forwarder in eighty countries on 6 continents. Extensive FTL/LTL Carrier and Consulting achievements in both domestic and international. Skilled and successful in negotiating and dealing with organized labor (ILA), regulatory agencies (FMC), ocean carriers, and third-party sales organizations (3PL's). Develop new product and trade lanes. P&L responsibility, budget management, cost control, quality assurance, multitask management, continuous improvement in a company. Consistently increasing performance levels and revenue while streamlining workflow. Downsizing & restructuring.

PROFESSIONAL EXPERIENCE

W.R. Schmidt & Associates, New Jersey (2003 – Present)
Maritime Consultant and Founding Principal

Ocean transportation and freight logistics, general management and operations consulting company with assignments in Fortune 500 and private companies.

- Provided consultation for the Port of Montreal, Houston, Los Angeles, and Eureka, California
- Consulted for Del Monte in world-wide logistics.
- Consulted for Drewry Shipping Consultants in the UK.
- Expert Witness,1. Before the Arbitration Panel, of Theodorf F. Martens, Jeffery M. Katz, and Jonathan D. Vanderveen in the Matter of Arbitration Between, Greenstar North America Holdings Inc. and Edgewater Growth Capital Partners,I.P., et al (2011) 2. Research and Report for Baker Hostelter re Scholz Aluminium GMBH v. Gearbulk, Inc. and Arrow Terminals (2010) 3. Draft Expert Report and Consultation Re; Bridget Calhoun a/n/f Kristopher Calhoun; Charlotte Pervis a/n/f Dominique Colston; and Margaret Saldana a/n/f ,Victoria Saldana (Colston) v. Primary Freight Services, Inc et al: in the 11th Judicial Court of Harris County, Texas (2009)
- Authored cost analysis for Sea Girt Terminal-Baltimore which proved company had cost advantage to the Mississippi River vs. using a west coast alternative.
- Authored cost analysis for APL/NOL chassis utilization.
- Authored cost & service analysis for Evraz Group Moscow comparing rail vs. ocean from China to Eastern Europe.

BDP Transport LLC, Philadelphia, PA (2000 – 2003)
President

President responsible for re-establishing and implementing the company's strategic business path with oversight of all financial, purchasing/service contracts, operations and sales functions. BDP Transport LLC, first commercial venture of its kind in the deregulated ocean transportation sector, between DuPont and BDP International Inc. BDP Transport LLC, multi-million dollar import and export logistics company servicing worldwide origins and destinations; Export 35K containers; Import 10K FEU, sales in excess of $200M.

- Growth of export product in first two year of 40%, while maintaining yield/operating margins in excess of budget projections.
- Growth of import product 59% in 20 months.
- Developed import product to 10K FEU/year.
- Exceed budget expectations, P&L transport margins; Export $250/TEU, Import $200/TEU.
- Established strategy and executed a cost competitive import (Asia) service.
- Restructured LCL Consolidated Services, generating negative contributions, to a Co-Load environment with acceptable margins and service levels.

Caro Trans International, Inc., Union, NJ (1997 – 2000)
President

Ocean transport intermediary, NVOCC providing LTL and FCL import and export services between the US and over 140 countries with 240 ports. Recruited by ABF Corp (Arkansas Best Freight) to reestablish company losing $5M/yr. Caro remains to date a growing entity with profits ranging from $6-7M/year.

- Re-organization and downsizing of company with over 200 employees to 135 employees.
- Closed operations in Rotterdam, Singapore, Montreal; appointing agents in each location.
- Doubled sales growth from $30M/yr to approximately $60M/year.
- Sold Caro Trans to new equity owners on behalf of ABC.
  - Sold Puerto Rico Services for $2.8M for new Equity owners.

  - Renegotiated Ocean service Contract saving $4M+/year in Puerto Rico Trade facilitating sale of company.
  - P&L turnaround from operating ratio of 110 to break even.

Paul F. Richardson & Associates, Inc., Holmdel, NJ (1992 – 1997)
Consultant
Provider of consulting services to ocean carriers, port authorities, labor unions, shipping associations and motor carriers. Emphasis on economic impact analysis in market strategies, operational port alternatives, intermodal routing and labor productivity.

- ILA Contract modification for wages and production on break bulk cargos led to new cargo at multiple locations.
- Economic analysis for Production Wage Negotiations; Master Contract-Carrier Containers.
- Negotiated service contract saving client approximately $500/container on volume of over 8K FEU/year.
- Clients/Projects included: Multiply Port Authorities, Ocean Carriers, Terminal Operators, Forwarders/Consolidators, ILA, and Motor Carriers.

Votainer USA, Inc., Cranford, NJ (1985 – 1992)
President
Responsible for the re-organization of USA operation of Multi-national Corporation, employing in excess of 200. Developed and managed overseas agents in Australia and South/Central America, implemented advertising campaign to support corporate objectives.

- Increased sales from $35M/year to +200M/year
- Drove P&L from loss of $500K/year to profit of +3M/year
- Purchased Unimodal Pacific SeaRoad Services Ltd; which became basis for Australia, New Zealand & UK services
- Created 1st NVOCC FCL & LCL Services to/from Brazil and Argentina.
- Negotiated Settlement of 50-mile Rule Litigation with Ocean Carrier Consortium on behalf of Votainer Worldwide and ended Litigation and set standards for all other Litigants.
- Created Bonus/Profit Sharing Plan that drove sales growth and profitability.
- Structured and implemented a strategic alliance with ABF to pick up and deliver LCL Cargo in U.S. and Canada
- Integrated six companies into One U.S. Organizations with uniform systems/ operations/finance and sales.

EDUCATION

BA, Fairleigh Dickinson University
Management Systems Certification, University, Nijenrode Netherlands
Advanced Management Program Certificate, The Wharton School

ADDITIONAL INFORMATION

IANVOCC (1987-1993)
(International Association of Non-Vessel Operating Common Carriers), Washington, D.C.

Director, International Association of NVOCCs
The only lobbying association formed to advance the legitimacy and legality of NVOCC's, including the acceptance of house B/L's by financial institutions in letter of credit as well as other financial instruments. Additionally filed litigation against numerous ocean carriers and the ILA who had instituted a 50 mile rule requiring all freight that originated within 50 miles of a port must be handled on dock, thereby eliminating NVOCC's, This legal fight went to the US Supreme court twice and was settled in 1992 when Votainer prevailed, and settled with the Ocean carriers.

EXHIBIT C

For the first time since the 2008-09 Great Recession, shippers have a "small smile on their faces" when it comes to the economy, ***National Industrial Transportation League President and CEO Bruce Carlton*** *said. Their increasing optimism in the economy, however, doesn't quell their concerns over a myriad of other issues, from tightening capacity to infrastructure investment. Carlton in late April spoke with JOC senior editors William B. Cassidy and Mark Szakonyi about the expectations NITL members have for the coming months.*

JOC: *What are your members seeing in terms of the economy and what are their expectations through 2015?*

CARLTON: I think there is a general small smile on their faces. It's not elation. Things are getting better. It's been slow. It's been slow from Day 1. The climb out of the deep hole from the Great Recession has been arduous, but we're getting there. There are definitely signs of economic growth, and that's all positive. They would love to see a big adrenaline shot hit the system (but that) doesn't seem to be in the offing.

JOC: *The American Trucking Associations' tonnage figures for last year were extraordinary. ATA Economist Bob Costello believes a lot of that came from energy production, automotive and to some extent housing supplies, as that market began to recover. Is it more of an industrial freight surge, as opposed to a broader consumer freight surge?*

"WHAT SHIPPERS LIKE AND TREASURE IS CHOICE."

CARLTON: It seems to be. A couple of our members have private truck fleets to serve their own company. I've heard from more than one of them, saying, "Man, we can't keep drivers. They're all heading up to the northern tier border states, or even to Canada, and doubling their wages." They can't compete with that. But you're right. It seems to be somewhat weighted toward the industrial making-things side, rather than finished-product retail. So much of our finished-product retail, though, is foreign-sourced — clothing and electronics and those kinds of things; that is good for the transportation companies to move that stuff, but, you know, we don't make that anymore.

JOC: *The NITL raised some concerns regarding the P3 when it was first announced. What's your impression now that the Federal Maritime Commission has given the vessel-sharing agreement the go-ahead?*

CARLTON: I think the FMC did the right thing. I know enough about the Shipping Act to say that there was no way the FMC would have a sufficient basis to say no, to block it. That's the way the law is written. What we asked them to do is what they did. We asked them to test this greatly expanded vessel-sharing agreement and to monitor it for its impact on the marketplace. Our world in that sphere is defined by competition. The carriers told me directly: We will individually compete, individually price, individually market, but the box will go on whatever ship is in the rotation at that moment. I said, "That's fine."

Our approach to the FMC was essentially the Nancy Reagan approach: Trust, but verify. Take them at their word that they will compete, but monitor the marketplace to make sure that all of the outward signs continue to be individually priced and marketed services.

JOC: *We'll either see larger vessel-sharing alliances come out or the P3 and G6 will expand in scope. What does that mean for your members?*

CARLTON: What league members and what shippers like and treasure is choice. Our best example, of course, is in the domestic trucking industry. The Yellow Pages, or whatever is the equivalent online, there's hundreds. There are literally thousands of trucking firms. If you don't get a good price and good service from A, you go to B and then you go to C. The market works very, very well. They like choice. To the extent that choice is limited in the future will be problematic, because then they (shippers) will not be able to use the basic competitive forces of the marketplace to their advantage.

The one thing you left off was the

A SHIPPER'S PERSPECTIVE

Bruce Carlton, head of the nation's largest shippers organization, opens up about trucking, ocean alliances and why BCOs are starting to smile

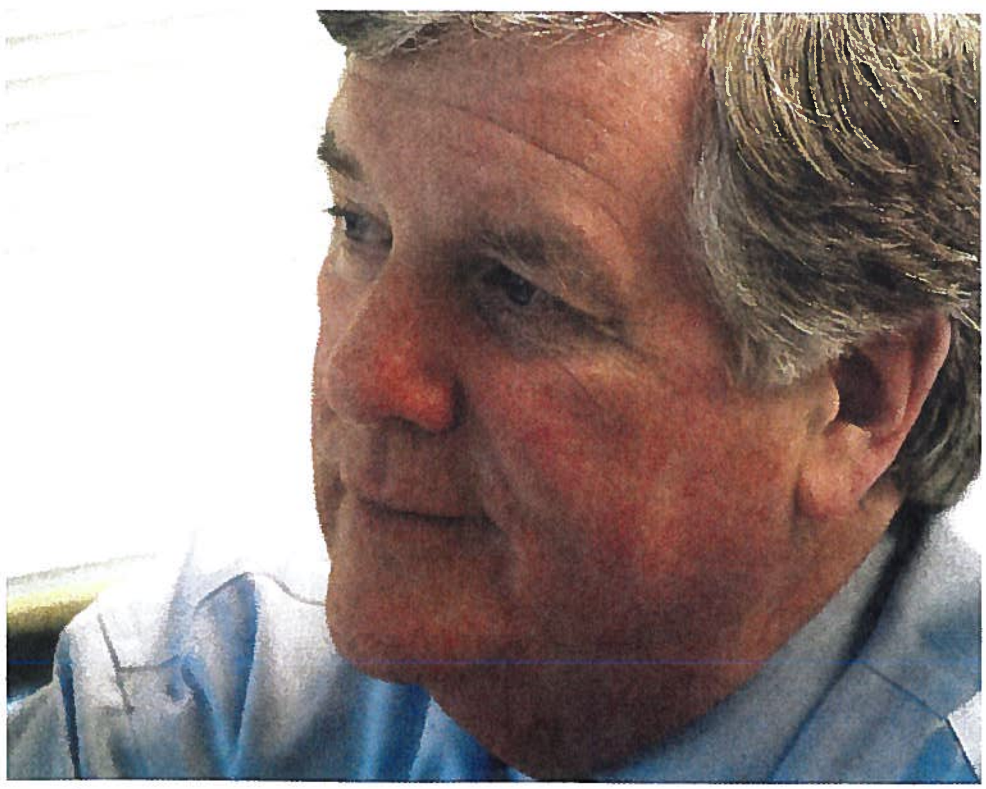
impact of mergers or an acquisition. A personal view on that is for reasons that I will never completely understand, there seems to be much more personal, perhaps even call it ego, involvement of shipowners in their ships. There's still a lot of family involved in the big companies — MSC (Mediterranean Shipping Co.), CMA CGM. I don't know whether they're going to be willing to give up the house flag in order to save the company, build a bigger company. It's contrary to basic economic analysis and MBA business school analysis. Those things are not supposed to enter in. You're supposed to be looking at the profit-and-loss statement, and the bottom line.

JOC: *I think it also goes beyond the family. It goes into a matter of sovereignties.*

CARLTON: That was my next point. There still are any number of companies that are either owned by or supported and buoyed up by national governments. The other interesting thing that we've seen, at least in some of the shipping companies, is that the old guard of senior management came up through the shipping ranks.

It wasn't uncommon to see executive vice president levels with the title of captain. They were ship drivers, and they knew the business from the operating end. Today, what we're seeing is the finance people, the dollar-and-cents analysts, who have risen to the top. That might make them stronger companies. We'll see. I know enough about the shipping industry and enough about just basic business to know that what's been going on in the international shipping business is not sustainable. You can't continue to lose billions of dollars every year and continue along that path.

"I DON'T GET ANY COMPLAINTS FROM SHIPPERS ABOUT WHAT THEY'RE PAYING FOR OCEAN SHIPPING. BUT I THINK THEY MIGHT BE A LITTLE WORRIED ABOUT A FEW YEARS FROM NOW."



JOC: *Knowing this, should we expect the industry to be able to hold rates once they push general rate increases?*

CARLTON: I am told that service contracts are being signed now at last year's rates and even below last year's rates. I don't get any complaints from shippers about what they're paying for ocean shipping. It is just silent. They have nothing to campaign about. But I think they might be a little worried about a few years from now.

JOC: *What will the likely growth of major vessel-sharing alliances mean for service? Proponents of the P3, for example, say the VSA will help the trio reduce dropped port of calls. Then you have the other side saying the P3 will use more transshipment hubs, which adds to the handling and might add more time to the voyage.*

CARLTON: I think they're probably saying yes to both. I think for a lot of folks it's a bit of wait and see. Very big shippers have much more leverage than small to medium-sized companies. The carriers cannot afford to alienate the really big shippers. They've got to cover those requirements, no question. The little guys might have to basically draft behind the solution sets that are established to handle the heavy load guys. So, for — I don't want to call them the mom-and-pop — but the small retailer or whatever, they're going to be takers, rather than market setters, but that's typically the case, anyway. I've not made a study of what the strings are going to look like and which ports and terminals are going to be served. I guess I'll be learning as we go along, as well.

The service will be there. It's just that it may change from Monday-Thursday pickup to Tuesday-Friday pickup. And it might not be at the terminal that you've been accustomed to dealing with in Los Angeles, but maybe it's a terminal in Long Beach. They're going to have to adjust.

JOC: *How will the inland connection fit into this?*

CARLTON: Some things are not adjustable. The railroads are where they are. For the intermodal market, the ships are going to have to come to where the railroads are, or as close as they can get. Southern California will get a lot of service because there are millions of people living there and it's a huge local consumption market. The motivation for the carriers is clear, and it's defensible and understandable. They need to cut their costs. It all boils down to the slot cost on the container ship. So they're building bigger ships. One crew can carry what two crews used to, or three. I get it.

I'm not sure how they're financing all of this. I mean, the debt overload is just unbelievable. I don't think any bank is willing to pull the plug on it because the whole house comes down if you start calling these debts. It's a tough business.

I DON'T THINK ANY BANK IS WILLING TO PULL THE PLUG ON IT BECAUSE THE WHOLE HOUSE COMES DOWN IF YOU START CALLING THESE DEBTS.

JOC: *Switching inland, very recently, the NITL finally got in front of the two Surface Transportation Board members and talked about the reciprocal switching proposal. Can you give us a refresher on your proposal?*

CARLTON: Let me just say at the outset what it is not. It is not forced switched, and it's not perpetual winter. It's not a taking. Fundamentally, forcefully, it is not re-regulation. All of those terms have been used to describe the proposal. What we have put forward we think is a very modest, very fair idea to inject a degree of competition, head-to-head competition in marketplaces where there is none.

Very briefly, what we have asked the board to do is to publish a rule, a new rule that would set the parameters for a shipper to receive a competing bid to move their freight by rail. And only shippers who are captive would be eligible to ask for this. If you're a shipper and you already have two rail lines serving your facilities, you cannot take advantage of this new rule. You have to be captive, or singly served.

And you have to demonstrate that your incumbent railroad has market power. We've done that by suggesting that if the — this is where people fall asleep — if the revenue-to-variable cost ratio is 240 percent or more, we are saying that is a conclusory presumption of market power. Or if the incumbent railroad has 75 percent of your market share for an origin-destination pair, that is also conclusory — meaning that the shipper would not have to present any additional evidence of market power.

If you can't meet the conclusory presumptions, you could still go into the STB and argue your case that the facts and circumstances of your facilities and your rail transportation merit the green flag, open door, to getting a competing bid. Thirdly, we have said that your facility has to be within a reasonable distance of an interchange — an existing interchange, where cars are regularly switched. And we've defined that reasonable distance, again, for a conclusory presumption, at 30 miles. Is 35 a better number? Again, argue your case to the STB.

The fourth provision is the one that is generally overlooked by my friends in the rail industry. It's a safety valve for the serving railroad. If the railroad can demonstrate to the STB that it's unsafe or would greatly diminish service to other customers, if it can demonstrate that, show that, not just proclaim it, then it could stop the switch.

JOC: *How do you think the STB commissioners view the idea of forcing railroads to give shippers with access to only one Class I line the ability to use another major railroad?*

CARLTON: I think it was an excellent hearing. The two members, Chairman (Daniel) Elliott and Vice Chairman (Ann) Begeman, asked very good questions. We think we had a very good experience there. We had a tremendous amount of support from other shippers and shipper organizations. Not surprisingly, the Class I railroads and the Association of American Railroads were adamant in their opposition. So, we're left with a decision-making point by the board.

JOC: *Any idea on when they will make a decision on whether to pursue rule-making?*

CARLTON: There is none. There's no statutory or regulatory requirement on the board to issue a decision by some date certain. We hope it's rather quickly because, again, going back to the very beginning, what we've asked them to do is publish our rule or our proposed rule, as modified by the board. Publish it out there for public comment. And that's easily an 18- to 24-month process in its own right. We've been at this now for just under three years. I'm getting older. I still hope to be here when this is resolved.

JOC: *Since the recession hit, we've seen shippers move freight to slower but cheaper modes. That can be seen from the shift of some goods from air to ocean, and from truck to intermodal. Will the pace of this shift toward deferred transportation slow as the economy picks up and companies are more generous with their transport budgets? Or will this trend continue?*

CARLTON: I think it's going to be a continuous process. What I hear from shippers, people who have to place the cargo on a conveyor somewhere to get it moved, is the pressure to reduce cost is relentless. Everybody is squeezing cost out. And so keeping in mind that the transportation and logistics function in a company is a cost center — it's not a profit center — they are spending company resources, not earning money. The pressure is relentless.

And there's that balancing act between reducing cost and on-time deliveries to get product where it's needed and when it's needed.

JOC: *What are you hearing from your members about their concerns on trucking? We've heard a lot over the first quarter and into this quarter about rapid increases in rates taking a lot of people by surprise, or being higher than people anticipated, partly because they couldn't get trucks when states were closed down because of the snow.*

CARLTON: For three or four years, people have been saying the sky is going to fall. The sky did not fall. With recovery comes more movements. You have to take the good with the bad. Trucking companies, some of them have assets parked. They can pull them out of storage if you can find a driver. You can put it back in. But it's not a perfectly flexible, perfectly fluid market. So, yeah, there are — I know from what I read and what league members tell me. There are parts of that market now that look like their capacity is capped or partially capped. They're not as resilient about being able to bring more capacity in. So, yeah, rates are going to go up. They are going up.

"FOR THREE OR FOUR YEARS, PEOPLE HAVE BEEN SAYING THE SKY IS GOING TO FALL (IN TRUCKING). THE SKY DID NOT FALL."

JOC: *Again, just as with a capacity crunch, we've heard this for like three or four years, the sky is going to fall. We've talked about collaboration for a couple of decades. Do you see this as really being a trend that's got legs?*

CARLTON: At least at the margin, these collaborative relationships are taking root. There's always going to be room for a shipper to buy some ad hoc spot service. "We're going to work a double shift this weekend. We got to get this stuff out of here. Find some trucks." But for the steady state business, I don't think it has changed the world yet. Folks are interested in having that discussion between service supplier and the service buyer. Entering into something that works for both. I think shippers know that prices are going to go up. They're not naïve. They weren't born yesterday. Prices are not going to go down.

JOC: *What are you telling your members in terms of preparing for any kind of International Longshore and Warehouse Union labor action?*

CARLTON: Our basic message is that there will not be a contract signed on July 1. Labor management negotiations don't typically work that way. Expect some protracted negotiations. The good news is that the two sides, the union and the Pacific Maritime Association, seem to be voicing their demands and wants in a very respectful way. It's a considerable contrast from our experience last year on the East Coast, Gulf Coast and a considerable contrast with the 2002 West Coast situation.

It's going to be a tough negotiation. I think a lot of shippers, where they can, are front-end loading pickup and delivery. You may not know what the toy of the season is going to be, but you know they're going to be selling Christmas lights. Lights are always selling. Get them now.

Some are probably mapping on paper — well, on the computer — alternatives, if they have an alternative. I don't think there's going to be a strike or a lockout. I would fully expect some informational picketing, maybe a bit of slowdown, maybe a little bit of, not every day, but an occasional emergency meeting of the union and its membership that makes the one-hour lunch three hours. These are pressure points to put on the PMA to remind them that they do have power.

Overall, though, the atmospherics are so much better than what we've seen in the past. Adults are in the room, but they have a tough job ahead of them.

JOC: *The NITL has obviously advocated for a rise in the fuel tax, indexing it to inflation. But as insolvency for the Highway Trust Fund nears, what are you expecting out of Congress in terms of dealing with a new service transportation bill, or at least keeping that fund giving money to the states?*

CARLTON: My guess, sitting here it's almost May 1, is that they won't have time to get a comprehensive bill done and they'll have to patch over the problem with another transfer from the general fund and some sort of temporary extension. Maybe they come back and fix it after the election. Maybe it's next year. It's got to be fixed, and I will salute both (Rep. Bill) Shuster, (R-Pa.) and (Sen. Barbara) Boxer, (D-Calif.). They're saying all great things, but it's just the crunch of the calendar that makes it a really rough road. I would love to be proved wrong, but I think we're going to see another "x" billion dollars transferred from the general fund.

JOC: *What does that mean for your members?*

CARLTON: Well, it's bigger than that. It means it's another chapter in our inability to do what we need to do as a nation to fix these big problems and resolve these big issues. I think they're just caught up in that. It's a much bigger impact on state governments and the highway builders. The roads will be there. It's just that this continuing focus on trying to do the right thing, whatever that means, it kind of saps the energy out of the system. People lose hope; they lose faith. They lose any sense of competency of government, which is unfortunate. JOC

EXHIBIT D

Transpacific ocean cargo lanes require long-term carrier investment

A range of non-economic factors also drive liner shipping, among them the overall supply of ships and the price of fuel

By Patrick Burnson, Executive Editor
March 05, 2012

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Global Port Tracker report calls for slow growth in 2011

Editor's Note: Brian Conrad, Executive Administrator, Transpacific Stabilization Agreement, will be presenting his views at an industry event staged in Southern California this week focusing on Asia Pacific maritime issues.

In an exclusive interview with our sister publication – Supply Chain Management Review – he addressed some key questions posed by ocean cargo shippers.

Supply Chain Management Review: Can you briefly go over the most urgent challenges facing the carrier community today?

Brian Conrad: Current market uncertainty worldwide has made it difficult to plan for long-term reinvestment in and configuration of carriers' global services. Markets are increasingly news-driven and prone to wild swings. To the extent that trade and finance are linked, a combination of political, regulatory and financial uncertainty have constrained investment and economic activity. At the same time, when we look behind the numbers we see signs of gradual recovery and slow growth, so we are generally optimistic for the Asia-US trade going forward over the next 18 months. It should be stressed, however, that there is still little expectation that trade growth will return anytime soon to the robust levels seen in 2008. Furthermore, a range of non-economic factors also drive liner shipping, among them the overall supply of ships and the price of fuel.

Carriers' global financial losses over 2009-11 present a major challenge. With the exception of at most two quarters of surging demand in 2010, container lines have been caught in a downward rate trajectory. Many carriers have priced their services at levels below profitability, choosing instead to focus on ensuring some contribution to cover their variable fleet operating costs. This approach has driven some lines to attempt to "save their way" out of unprofitability by employing larger ships with lower unit slot costs – a strategy that is not sustainable in the long term. Lines will ultimately need to achieve returns above their cost of capital in order to adequately maintain service levels and reinvest for the future.

The two most difficult challenges in the transpacific, however, involve two prevailing shipper perceptions – that winter season promotional spot rates should be carried over into 12-month contracts, and that carriers should price their services not according to any measurable supply chain value proposition, but solely according to whether the supply-demand balance at contract signing is seen to be in the carriers' or the

From the May 2014 Issue

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shippers' favor.

Supply Chain Management Review: How does TSA prepare for contract negotiations?

Brian Conrad: Keep in mind that TSA does not negotiate service contracts on behalf of its members. They negotiate individually and confidentially, and we have no specific knowledge of their internal processes for doing that. However, as you know, TSA does typically establish voluntary guidelines that carriers can use as guideposts in their individual negotiations. The process for that can generally be described as follows: TSA lines each bring to the table their best assessments of current market conditions and forecasts developed internally and by independent outside industry sources, including their customers. They consider both macroeconomic trends and market conditions in major moving commodity segments.
They assess cost increases during the past year and likely increases over the coming contract term, in areas such as inland transportation, cargo handling, equipment management, vessel feeder and charter costs, IT spending and regulatory compliance.

Finally they look at rate trends relative to cost recovery and profitability targets. The objective is to begin contract negotiations each year from a compensatory baseline coming out of the winter season, and then adjust rates and charges in light of forecast conditions.

Supply Chain Management Review: Can you provide a brief description of the contracting procedures?

Brian Conrad: Again, the contract process varies by line and by customer account.

Generally speaking, 90 percent of Asia-U.S. container cargo moves under some 10,000 contracts each year. TSA announces its recommended revenue program guidelines around the beginning of each year to provide the market with an initial sense of carriers' concerns and priorities around rates, charges and service.

Carriers initiate contact with existing accounts to discuss renewal and reach out to shippers in particular market niches they want to pursue. Carriers also receive bid requests from shippers and from 3PLs acting on their behalf.

Carriers and customers discuss their needs for the coming year – volume, equipment, route segments, transit times, price – and more detailed negotiations continue from there, in a series of back and forth discussions that typically run from February through April of each year. Both shippers and carriers generally have to compromise on various issues during contract negotiations; it's a two-way process.

In that context, it is important for all contracting parties to recognize that financially healthy, competitive carriers are in the best interests of the trade as a whole. For that reason, both shippers and carriers need to take a long-term view of their relationship and negotiate accordingly.

Supply Chain Management Review: Where do you expect shippers to compromise this year? And why?

Brian Conrad: It is not useful to view negotiations in adversarial or zero-sum terms. It is the carriers' job going into negotiations to know their costs and to resist competitive pressures to discount where it threatens their overall viability. Carriers should also not pass up opportunities to explore service options that can offset potentially higher rates with supply chain efficiencies or cost savings – or perhaps lower rates in exchange for benefits that help them reposition equipment or spread out cargo volumes year-round.

Shippers, meanwhile, might rethink the long-held view that transportation/logistics is simply a cost on the P/L statement to be bargained down to meet overall internal landed cost targets. Instead, many customers have found the contract framework useful in achieving service benefits, in the form of cost savings and competitive advantages across the supply chain, by sharing information and building in mutual service commitments, shipment visibility and performance measures.

Supply Chain Management Review: Have carriers adequately addressed over-capacity issues?

Brian Conrad: TSA as a group does not involve itself with issues related to capacity management; those decisions are made entirely by the individual lines based on their service goals, competitive objectives and assessments of market conditions.

It is worth pointing out in a general sense, however, that the increase in global capacity seen in recent months as new, larger ships are delivered, does not have the same effect in the transpacific as in other cargo markets. Infrastructure constraints, mainly channel drafts at most U.S. ports and in the Panama Canal as well as terminal productivity levels, will continue to limit average vessel size and loadability through 2013. So the largest ships, and many of the cascaded ships they replace, will remain in other trades.

Supply Chain Management Review: In the best-case scenario, where do you see future opportunity and growth?

Brian Conrad: We see the U.S. market steadily recovering, with demand already picking up in the automotive sector and green shoots in many areas of retailing, including apparel, footwear, home/garden supplies, appliances and toys. We expect other segments to pick up as the job market and housing crisis improve.

A rising entrepreneurial middle class in Asia is likely to translate into new business formation with an eye to exports as well as domestic consumption. A large share of two-way transpacific trade is related to two-way manufacturing and retail investment – Japanese auto parts feeding U.S. plants, hard drives made in Thailand, frozen potatoes and poultry for U.S. fast food chains throughout Asia. That trend is likely to continue and expand.

Trade is remarkably simplified with the ability to market worldwide over the internet, with business-to-business portals, social media and online payment. New bilateral and multilateral trade agreements will offer even small and mid-sized businesses in emerging Asian markets expanded opportunities to conduct global business across the Pacific. All of this new trade growth will in turn translate into cargo growth as 90 percent of physical goods moves by ocean, much of it in containers.

About the Author

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Patrick Burnson is executive editor for *Logistics Management* and *Supply Chain Management Review* magazines and web sites. Patrick is a widely-published writer and editor who has spent most of his career covering international trade, global logistics, and supply chain management. He lives and works in San Francisco, providing readers with a Pacific Rim perspective on industry trends and forecasts. You can reach him directly at pburnson@peerlessmedia.com.

Recent Entries

Transplace and Celtic International roll out more Mexico-based intermodal offerings

Non asset-based third-party logistics (3PL) services provider Transplace and its company-owned intermodal marketing company (IMC) Celtic International recently announced they have expanded its cross-border and intra-Mexico intermodal services, which they said will provide shippers with a more thorough U.S.-Mexico service into and out of Mexico.

Seven Steps to Ensure ERP Implementation Success - FREE White Paper

Learn the 7 steps that lead to a successful ERP implementation.

LSO is acquired by Eagle Merchant Partners

Affiliates of Eagle Merchant Partners, a private equity firm in Atlanta with a concentration southeast U.S.-based middle-market buyouts, acquired Austin, Texas-based LSO (Lone Star Overnight), a parcel delivery company.

P3 Network vessel-sharing agreement now expected to begin this fall

The much anticipated P3 Network vessel-sharing agreement, whose objective is to give ocean carrier heavyweights Maersk, MSC, and CMA CGM the ability to discuss and agree on the size, number and operational characteristics of vessels to be operated on transatlantic and transpacific trade lanes between the U.S. and Asia, North Europe and the Mediterranean, will be getting a later start than originally thought.

Tight capacity remains intact for now and likely into the future, reports FTR

Tight capacity in the freight transportation market continues to be the norm, and that theme was no exception in the most recent edition of the Shippers Condition Index (SCI) from FTR.

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EXHIBIT E

THE JOURNAL

(http://www.joc.com)

Maersk to Charge Fees for No-Show Containers

Jun 23, 2011 3:40PM GMT
Carrier also plans to pay for rolled boxes
Peter T. Leach
Source:
The Journal of Commerce Online

Maersk Line is planning to charge its customers a fee for booked containers that fail to appear at the port of departure, and plans to compensate customers for booked containers that it fails to load on departing ships, the carrier said.

Maersk Line CEO Eivind Kolding addressed the issue of fees for no-show and rolled containers in a speech he gave at the time he presented his manifesto on June 7 calling for radical changes in the way the container industry conducts business.

"Right now we know that 30 percent of the containers that are booked with us do not turn up. That's 30 percent no-shows," he said in an interview with the Journal of Commerce on June 13. "That's the average. So there is something for us to do in the industry to take the waste out."

Kolding said Maersk will start to try to alter no-show behavior by charging what it calls a "load protection fee."
"If we do not get the container on board, we will pay the customer. If the customer does not show up with the container, they will pay us, so we can get a behavioral discipline in the industry," Kolding said.

The "load protection fee" will be $100 per dry container and $500 per reefer container for containers that fail to show up in time for a departing vessels, according to an interview with Maersk Line's Senior Director for Charge Management, Network and Product, John Nielsen, by International Freight Weekly.

Nielsen told IFW that Maersk is prepared to pay compensation of the same amounts if Maersk cannot pick up shipment because of overbooking, operational constraints or equipment shortages.

He said there would be a window to allow customers to cancel or change a booking, with the charge implemented if the cancellation happened with less than seven days' notice before vessel.

The Danish carrier plans to put a system of fees for no-show containers and rolled container into effect after a year of testing the scheme in the U.S. and other markets. In the U.S. it charged a nominal $15 per no-show containers during the test it conducted last year.

Kolding also worries about the failure of its shipping customers to meet their contracted commitments of cargo volumes during the year.

"If we just take our year-to-date figures, only 41 percent of customers have delivered 100 percent or more of their commitments. If we allow for a little bit of margin, let's say 10 percent variation, let's say 90 percent fulfillment is OK. Only 56 percent of the customers have done that. Still 44 percent of our customers have delivered even 90 percent of what they have promised," Kolding said.

"That's another waste we need to address, " he said.

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Container Shipping

Source URL: http://www.joc.com/container-shipping/maersk-charge-fees-no-show-containers